DOCKET

No. 83-1325-CFX Title: Air Line Pilots Association, International,
Status: GRANTED Petitioner
v.
Harold H. Thurston, et al.

Docketed:
February 8, 1984 Court: United States Court of Appeals
for the Second Circuit

Vide:
83-997 Counsel for petitioner: Abram, Michael E.

Counsel for respondent: Cechler Jr., Henry J., Fay, Raymond C., Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Feb 8 1984	G	Petition for writ of certiorari filed.
2	Mar 12 1984		Brief of respondent Trans World Airlines, Inc. in support of petition filed.
3	Mar 14 1984		DISTRIBUTED. March 30, 1984
4	Mar 15 1984	X	Memorandum of respondent EEOC filed.
5	Mar 16 1984	X	Brief of respondents Harold H. Thurston, et al. in opposition filed.
6	Mar 27 1984	X	Reply brief of petitioner Air Line Pilots Assn. filed.
7	Apr 2 1984		Petition GRANTED. The case is consolidated with No. 83-997, Trans World Airlines, Inc. v. Thurston, and a total of one hour is allotted for oral argument.
9	Apr 28 1984		Order extending time to file brief of petitioner on the merits until May 31, 1984.
10	May 2 1984	G	Motion of United Air Lines, Inc. for leave to file a brief as amicus curiae filed.
11	May 15 1984	G	Motion of the Solicitor General for divided argument filed.
12	May 21 1984		Motion of United Air Lines, Inc. for leave to file a brief as amicus curiae GRANTED.
13	May 17 1984		Brief of petitioner TWA, Inc. filed. VIDED.
14	May 17 1984	G	Motion of Equal Employment Advisory Council for leave to file a brief as amicus curiae filed.
15	May 25 1984	G	Motion of Trans World Airlines, Inc. for divided argument filed.
16	May 29 1984		Response of Air Line Pilots Association to motion of the Solicitor General for divided argument filed.
18	May 29 1984	G	Motion of Air Line Pilots Association for divided argument filed.
22	Jun 4 1984		Motion of Equal Employment Advisory Council for leave to file a brief as amicus curiae GRANTED.
23	Jun 4 1984		Motion of the Solicitor General for divided argument GRANTED.
24	Jun 4 1984		Motion of Trans World Airlines, Inc. for divided argument GRANTED. and a total of fifteen minutes is allotted for that purpose.
25	Jun 4 1984		Motion of Air Line Pilots Association for divided argument GRANTED. and a total of fifteen minutes is

No. 83-1325-CFX

Entry	Date	Note	Proceedings and Orders
			allotted for that purpose.
26	May 31 1984		Brief of petitioner Air Line Pilots Assn. filed. VIDED.
27	May 31 1984	G	Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae filed.
28	Jun 11 1984		Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae GRANTED.
30	Jun 28 1984		Order extending time to file brief of respondent on the merits until July 7, 1984.
31	Jul 6 1984		Brief of respondent Air Line Pilots Association, International filed. VIDED.
32	Jul 6 1984		Brief of respondent EEOC filed. VIDED.
33	Jul 6 1984	G	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae filed.
34	Jul 11 1984		Brief of respondents Harold H. Thurston, et al. filed. VIDED.
35	Jul 20 1984		Record filed.
36	Aug 8 1984		CIRCULATED.
37	Aug 9 1984		Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae GRANTED.
38	Aug 10 1984		SET FOR ARGUMENT. Tuesday, October 9, 1984. (3rd case) This case is consolidated with No. 83-997. (1 hr.)
39	Sep 24 1984	X	Reply brief of petitioner Trans World Airlines, Inc. filed. VIDED.
40	Sep 27 1984	X	Reply brief of respondent EEOC filed. VIDED.
41	Oct 2 1984	X	Reply brief of petitioner Air Line Pilots Assn. filed. VIDED.
42	Oct 9 1984		ARGUED.

CROSS

PETITION

83-1325

No.

Office - Supreme Court, U.S.
FILED
FEB 6 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Cross-Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and TRANS WORLD AIRLINES, INC.,

Respondents.

CONDITIONAL CROSS-PETITION OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL E. ABRAM
(Counsel of Record)
JAY P. LEVY-WARREN
COHEN, WEISS AND SIMON
330 West 42nd Street
New York, New York 10036
(212) 563-4100

Counsel for Cross-Petitioner Air Line Pilots Association, International

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
PARTIES	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION	7
CONCLUSION	10

TABLE OF AUTHORITIES

STATUTES

Age Discrimination in Employment Act (29 U.S.C. §§621-634).....passim

ADMINISTRATIVE REGULATIONS

14 C.F.R. §121.383(c)..... 3

QUESTION PRESENTED

Whether the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621-634, requires that an employee disqualified to continue working in a particular position because of an age-based bona fide occupational qualification ("BFOQ") be permitted to transfer to another position (not subject to a BFOQ) merely because employees disqualified for non-age reasons (e.g., reductions-in-force, loss of proficiency, medical disability) are permitted to transfer?

PARTIES

Trans World Airlines, Inc. ("TWA"), Harold H. Thurston, Christopher J. Clark, C.A. Parkhill, the Equal Employment Opportunity Commission ("EEOC") and the Air Line Pilots Association, International ("ALPA") were all parties to the decision sought to

be reviewed here. Nicholas Vasilaros, et al., were intervenors in a consolidated case in the court below, ALPA v. TWA, 78 Civ. 3707, which is not a subject of proceedings in this Court.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 713 F.2d 940 and appears in the Appendix to the petition in TWA v. Thurston, No. 83-997, at page A-1. The opinion of the United States District Court for the Southern District of New York is officially reported at 547 F.Supp. 1221 and appears in that Appendix at page A-44.

JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 1983. Rehearing and

suggestion for rehearing in banc was denied on November 10, 1983. Pursuant to Rule 20.5 of this Court, this cross-petition is filed within 90 days of the date of denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

Sections 4(a), (c)(3), (f)(1) and (f)(2) of the ADEA, 29 U.S.C. §§623(a), (c)(3), (f)(1) and (f)(2), and 14 C.F.R. §121.383(c) are involved in this cross-petition, and are fully set forth in the petition for a writ of certiorari in TWA v. Thurston, No. 83-997.

STATEMENT OF THE CASE

TWA employs flight deck crew members in Captain, First Officer, International Relief Officer, and Flight Engineer status. The

Federal Aviation Administration ("FAA") Age 60 Rule, 14 C.F.R. §121.383(c), does not permit service as a "pilot" after age 60. The FAA does not consider a flight engineer to be a "pilot" within the meaning of 14 C.F.R. §121.383(c).

Plaintiffs in this action were all serving as TWA "pilots" at the time they reached age 60. For purposes of this litigation, it is not disputed that an age less than 60 is a bona fide occupational qualification ("BFOQ") for commercial airline pilots. ALPA v. TWA, A-7-8.

Pursuant to the seniority system embodied in collective bargaining agreements ("Agreement") between TWA and ALPA, flight deck crew members may be awarded vacant positions in another status (e.g., a captain may bid for, and be awarded a flight engineer

vacancy). In response to the 1978 amendments to the ADEA, P.L. 95-256, TWA unilaterally adopted a policy on August 10, 1978, which permitted all flight deck crew members in "flight engineer status" prior to age 60 to continue in employment past age 60, but did not allow "pilots" disqualified by the FAA Age 60 Rule to transfer to flight engineer status after age 60.

The vast majority of captains who desired to serve past age 60 bid for flight engineer vacancies effective prior to age 60, and were permitted to continue in employment as flight engineers after age 60. A-61, n.8. Those relatively few captains who were unable or unwilling to bid for flight engineer vacancies effective prior to age 60 were terminated when they were disqualified from further "pilot" service

by the FAA Age 60 Rule. While the seniority system provisions of the Agreement do not contain any age-based limitation on the exercise of seniority rights, ALPA v. TWA, A-26, the TWA System Board of Adjustment found that other provisions of the Agreement in effect on April 6, 1978 (the effective date of the 1978 ADEA amendments) authorized termination at age 60 for all flight deck crew members, unless TWA decided to continue their employment.[1]

The Second Circuit held that TWA's allowing captains disqualified for medical or proficiency reasons, or no longer able to serve as a result of reductions-in-force, to transfer to flight engineer positions, and refusing to provide similar transfer rights to pilots disqualified by the FAA

---

[1]The decision of the System Board is attached as Exhibit "B" to the Brief of ALPA in Opposition to the Petition in 83-997.

Age 60 rule, constituted age discrimination. A-10-11. The Court rejected claims by ALPA that §4(f)(1) of the ADEA, 29 U.S.C. §623(f)(1), authorized mandatory retirement, including the termination of seniority rights, at an age which is a BFOQ for captains. A-26-29. The Court also held that ALPA had caused or attempted to cause TWA to engage in unlawful conduct in violation of §4(c)(3) of the ADEA, 29 U.S.C. §623(c)(3). A-32-33.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

The petition in Trans World Airlines, Inc. v. Thurston, et al., No. 83-997, raises three questions for review by this Court: (1) whether specific intent to discriminate is necessary to establish a "willful" violation of the ADEA; (2)

whether an employer held jointly liable with a labor union for violations of the ADEA may shift a portion of the recoverable damages to that union; and (3) whether the ADEA requires an employer which accommodates employees disqualified for non-age reasons to accommodate employees disqualified for age reasons. In the event this Court decides to grant a writ of certiorari with respect to the second or third questions presented by TWA, ALPA requests that this Court grant this conditional cross-petition.

The Second Circuit held "that ALPA's actions in signing the post-1978 Working Agreement and in causing TWA to implement other restrictions on the downbidding older captains...render it liable under [§4(c)(3) of the ADEA, 29 U.S.C.] §623(c)(3)...." As

§4(c)(3) only prohibits a union "to cause or attempt to cause an employer to discriminate...in violation of this section...," ALPA has a direct interest in any determination whether TWA violated the ADEA: reversal of the judgment against TWA would undercut the basis for the judgment against ALPA.

The question presented in this cross-petition encompasses both the discriminatory treatment question presented by TWA, and the application of the BFOQ defense set forth in §4(f)(1) of the ADEA, 29 U.S.C. §623(f)(1), to the transfer rights of pilots disqualified by the FAA Age 60 Rule. The Second Circuit specifically addressed these issues. A-26-31. The legislative history of the 1978 ADEA amendments is an essential element of both questions.[2]

---

[2] Compare TWA Petition at 19 with ALPA v. TWA, A-27-28.

Accordingly, granting this conditional cross-petition will not substantially expand the proceedings before this Court.

CONCLUSION

For the foregoing reasons, the conditional cross-petition of Air Line Pilots Association, International should be granted in the event that the petition of Trans World Airlines, Inc. in No. 83-997 is granted with respect to the second or third questions presented therein.

Respectfully submitted,

MICHAEL E. ABRAM
COHEN, WEISS and SIMON
330 West 42nd Street
New York, N.Y. 10036
Tel. (212) 563-4100

Attorney for Cross-Petitioner
Air Line Pilots Association, International

Of Counsel:

JAY P. LEVY-WARREN

RESPONDENT'S

BRIEF

Office - Supreme Court, U.S.
FILED
MAR 12 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Cross-Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and TRANS WORLD AIRLINES, INC.,
Cross-Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF CROSS-RESPONDENT TRANS WORLD AIRLINES, INC. IN SUPPORT OF CROSS-PETITION FOR A WRIT OF CERTIORARI

HENRY J. OECHSLER, JR.
30 Rockefeller Plaza
New York, N.Y. 10112
(212) 541-5800
Counsel of Record for Cross-Respondent Trans World Airlines, Inc.

DONALD I STRAUBER
PETER N. HILLMAN
CHADBOURNE, PARKE, WHITESIDE & WOLFF
Of Counsel

3 pp

BEST AVAILABLE COPY

This is in reply* to the conditional cross-petition of the Air Line Pilots Association ("ALPA") filed on February 8, 1984. ALPA's cross-petition was filed in the event that the petition of Trans World Airlines, Inc. v. Thurston, et al., No. 83-997, was granted "with respect to the second or third questions presented therein." (ALPA Pet., p. 10). By order dated February 27, 1984, TWA's petition was granted. Since the issue in ALPA's cross-petition pertains to a question already the subject of TWA's petition, TWA has no objection to the grant of ALPA's cross-petition and agrees with ALPA that "granting this conditional cross-petition will not

---

*Trans World Airlines, Inc. ("TWA") has no parent, subsidiary or affiliate required to be reported under Rule 28.1 of this Court. Effective February 1, 1984, TWA was divested from Trans World Corporation.

substantially expand the proceedings before this Court." (ALPA Pet., p. 10).

If ALPA's cross-petition is granted, TWA further respectfully requests that it be consolidated with TWA v. Thurston, No. 83-997, and that a single briefing schedule be established for both dockets.

Respectfully submitted,

HENRY J. OECHLER, JR.
30 Rockefeller Plaza
New York, N.Y. 10112
(212) 541-5800
Counsel of Record for
Cross-Respondent
Trans World Airlines, Inc.

DONALD I STRAUBER
PETER N. HILLMAN
CHADBOURNE, PARKE,
WHITESIDE & WOLFF

Of Counsel

March 9, 1984

BRIEF FOR THE UNITED STATES

Office - Supreme Court, U.S.
FILED
MAR 15 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1325

In the Supreme Court of the United States

OCTOBER TERM, 1983

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
PETITIONER

v.

HAROLD H. THURSTON, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DAVID L. SLATE
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20507

BEST AVAILABLE COPY

6 pp

TABLE OF AUTHORITIES

Page

Cases:

A.H. Phillips, Inc. v. Walling, 324 U.S. 490 3

Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743 3

Statute, regulation and rules:

Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. V) 621 *et seq.*:

§ 2(b), 29 U.S.C. 621(b) 3

§ 4(f)(1), 29 U.S.C. 623(f)(1) 1, 2, 3

14 C.F.R. 121.383(c) 1

Sup. Ct. R.:

Rule 19.6 2

Rule 21.1(a) 2

Rule 22.4 2

Rule 34.1(a) 2

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1325

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
PETITIONER

v.

HAROLD H. THURSTON, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Section 4(f)(1) of the Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C. 623(f)(1)) permits an employer to "take any action otherwise prohibited [by the Act] * * * where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." A Federal Aviation Administration regulation (14 C.F.R. 121.383(c)) prohibits persons age 60 or over from serving as captains or first officers on commercial aircraft. Cross-petitioner contends that, in light of these two provisions, an employer may refuse to transfer over-age pilots to other positions that do not have a similar age limitation.

1. The facts material to the question presented here are set out in our opposition to the petition for certiorari filed by Trans World Airlines in this case (cert. granted, No. 83-997 (Feb. 27, 1984)). That petition presents, inter alia,

the question whether the airline violated the Age Discrimination in Employment Act by involuntarily retiring airline pilots at age 60, when they are disqualified from serving as pilots, because it refused to allow them to transfer to other jobs after age 60 although all younger, similarly situated pilots were allowed to do so. The question presented by cross-petitioner merely states a subsidiary issue fairly comprised within that question (question 3) presented in the original petition. Cross-petitioner (as a respondent supporting the petitioner) may thus present its argument on this issue to the Court in a brief on the merits in No. 83-997 (Sup. Ct. R. 19.6; 21.1(a); 34.1(a)). Accordingly, there is no need for the Court to grant this cross-petition.[1]

2. There is, in any event, no merit to cross-petitioner's argument based on the bona fide occupational qualification (BFOQ) provision of Section 4(f)(1) of the ADEA. That argument was properly rejected by the court below (83-997 Pet. App. A26-A29) and has not been asserted in this Court by TWA. The employees involved in this case sought to continue their employment after age 60, not as captains or first officers, but as flight engineers to whom the FAA rule does not apply. Cross-petitioner argues, however, that Section 4(f)(1) immunizes "any action" against employees who are beyond an age which is a BFOQ for the job they hold, including involuntary retirement, discharge, and the age-based refusal to allow them to transfer to a non-BFOQ position. That contention is supported neither by the text of the ADEA nor its legislative history, and is contrary to the

[1]Ordinarily, the question whether to grant a cross-petition should not arise after the grant of certiorari. See Sup. Ct. R. 22.4.

consistent interpretation of the Act by the agencies responsible for its enforcement.[2]

As the court below recognized (83-997 Pet. App. A28-A29), Section 4(f)(1) "creates an exception to the statute's general prohibition against discrimination based on age, [and thus] • • • must be narrowly construed and may be invoked only if an employer proves 'plainly and unmistakably' that its employment practice meets the 'terms and spirit' of the remedial legislation" (quoting *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945)). See also *Orzel* v. *City of Wauwatosa Fire Dep't*, 697 F.2d 743, 748 (7th Cir. 1983). The court correctly held that Section 4(f)(1), by its terms, excuses "only those age-based actions against employees that are related to the 'particular job' (in this case captain or first officer)" (83-997 Pet. App. A28). Thus, even if a 60-year old captain or first officer is subject to a BFOQ for an occupation to which he no longer makes any claim,[3] that is no defense under Section 4(f)(1) for TWA's age-based refusal to allow him to transfer to the non-BFOQ flight engineer seat — a transfer in no way prohibited by the FAA rule.

Cross-petitioner's construction of Section 4(f)(1) as authorizing TWA to retire and refuse transfers to pilots because of age frustrates the very purposes for which the ADEA was enacted — "to promote employment of older persons on their ability rather than age; to prohibit arbitrary age discrimination in employment" (29 U.S.C. 621(b)).

[2]The Department of Labor, from whom ADEA enforcement authority was transferred to EEOC, agreed with the Commission that pilots subject to the FAA Age 60 rule must be considered for alternative assignments without regard to age on the same basis as other employees. The Department stated its position in two opinion letters issued shortly after passage of the 1978 ADEA amendments (C.A. App. 869-871).

[3]The validity of the FAA rule has not been challenged by any party in this case.

As the court below explained (83-997 Pet. App. A28), cross-petitioner's expansive reading of the provision would create an exception that would swallow the Act.

This Court's consideration of this cross-petition will have no effect on cross-petitioner's right to present arguments on this issue to the Court in its brief on the merits in *TWA* v. *Thurston*, No. 83-997. It is therefore submitted that this Court should defer consideration of the cross-petition until it decides No. 83-997 on the merits, and then dispose of it in light of that decision. Alternatively, the cross-petition should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

DAVID L. SLATE
General Counsel
Equal Employment Opportunity Commission

MARCH 1984

[illegible]

RESPONDENT'S

BRIEF

No. 83-1325

FILED
MAR 16 1984
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Cross-Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and TRANS WORLD AIRLINES, INC.,

Cross-Respondents.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

BRIEF FOR CROSS-RESPONDENTS HAROLD H. THURSTON, CHRISTOPHER J. CLARK, AND C.A. PARKHILL IN OPPOSITION

Raymond C. Fay
(Counsel of Record)
Alan M. Serwer
Susan D. Goland
HALEY, BADER & POTTS
111 S. LaSalle St., #1600
Chicago, IL 60603
(312) 782-7416

Attorneys for Cross-Respondents Harold H. Thurston, Christopher J. Clark, & C.A. Parkhill

March 1984

BEST AVAILABLE COPY

20 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a bona fide occupational qualification (BFOQ) for the position of flight engineer may be established solely by analogy to other flight deck positions.

2. Whether a labor organization's liability under the Age Discrimination in Employment Act (ADEA) is contingent upon the liability of the employer.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	1
TABLE OF AUTHORITIES	iii
COUNTERSTATEMENT OF THE CASE	1
REASONS THE WRIT SHOULD NOT BE GRANTED	4
A. ALPA May Not Assert A "BFOQ-By-Analogy" Defense	5
B. ALPA Is Independently Liable For Age Discrimination	12
CONCLUSION	15

TABLE OF AUTHORITIES

Cases	Page
Air Line Pilots Association, International v. Trans World Airlines, Inc., 713 F.2d 940 (2d Cir. 1983), cert. granted, 52 U.S.L.W. 3624 (U.S. Feb. 27, 1984)	passim
Criswell v. Western Air Lines, Inc., 709 F.2d 544 (9th Cir. 1983)	10
Dothard v. Rawlinson, 433 U.S. 321 (1977)	7
EEOC v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982)	9
EEOC v. County of Los Angeles, 706 F.2d 1039 (9th Cir. 1983) cert. denied, 104 S.Ct. 984 (1984)	9
Farmer v. ARA Services, Inc., 660 F.2d 1096 (6th Cir. 1981)	13
Gathercole v. Global Associates, 560 F.Supp. 642 (N.D. Cal. 1983), appls. pending, Nos. 83-1885 et al. (9th Cir.)	11
James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978)	13
Lorillard v. Pons, 434 U.S. 575 (1978)	8

	Page
Monroe v. United Air Lines, Inc., 27 Empl.Prac.Dec. [CCH] ¶32,230 (N.D. Ill. 1981)	10
Monroe v. United Air Lines, Inc., 31 Empl.Prac.Dec. [CCH] ¶33,330 (N.D. Ill. 1983), appls. pending, Nos. 83-1245 et al. (7th Cir.)	10
Orzel v. City of Wauwatosa Fire Department, 697 F.2d 743 (7th Cir.), cert. denied, 104 S.Ct. 484 (1983)	9
Sears v. Atchison, T.&S.F. Ry. Co., 645 F.2d 1365 (10th Cir. 1981), cert. denied, 102 S.Ct. 2045 (1982)	13
Touhy v. Ford Motor Co., 675 F.2d 842 (6th Cir. 1982)	11

Statutes and Regulations

Age Discrimination in Employment Act, 29 U.S.C. §621 et seq.	passim
Section 4(a), 29 U.S.C. §623(a)	8
Section 4(c)(3), 29 U.S.C. §623(c)(3)	12
Section 4(f)(1), 29 U.S.C. §623(f)(1)	8
Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e et seq.	8
Railway Labor Act, 45 U.S.C. §151 et seq.	2
14 C.F.R. §121.383(c)	5

BRIEF FOR CROSS-RESPONDENTS HAROLD H. THURSTON, CHRISTOPHER J. CLARK, AND C. A. PARKHILL IN OPPOSITION

Cross-respondents Harold H. Thurston, Christopher J. Clark, and C. A. Parkhill (the Thurston respondents) respectfully pray that the Conditional Cross-Petition for a Writ of Certiorari of the Air Line Pilots Association, International (ALPA) be denied. 1/

COUNTERSTATEMENT OF THE CASE

This action arises from the dispute concerning the employment by Trans World Airlines, Inc. (TWA) of flight engineers beyond age sixty. On August 10, 1978, the

---

1/ The following abbreviations are used in this brief: "J.A. ____" refers to the Joint Appendix filed in the Court of Appeals; "A-___" refers to the Appendix to TWA's Petition for a Writ of Certiorari.

day that TWA announced that it would employ certain flight engineers beyond age sixty, ALPA filed a lawsuit seeking to bar such employment. No. 78 Civ. 3707 (KTD) (S.D.N.Y.) (J.A. 108-115). 2/ Cross-respondents Thurston and Clark, former Captains for TWA who had been involuntarily retired by TWA at age sixty, intervened as defendants (J.A. 12, item 3 and item following 11). After the statutory waiting period in 29 U.S.C. §§626(d) and 633 had expired, they filed their own action under the ADEA, 29 U.S.C. §621 et seq., alleging that TWA, with ALPA's encouragement, had

---

2/ ALPA alleged that TWA's proposed practice was a "major" change in terms and conditions of employment in violation of the Railway Labor Act, 45 U.S.C. §151 et seq. ALPA also sought a declaratory judgment that the 1978 ADEA amendments did not compel the employment of flight engineers over age sixty (J.A. 108-115).

discriminated against them on the basis of age by refusing to allow them to transfer to flight engineer positions and by requiring them to retire on or shortly after their sixtieth birthdays (J.A. 58-73). 3/ The two actions were consolidated on the Court's own motion (J.A. 10, item 29; J.A. 15, item 63).

The district court granted summary judgment for TWA in both actions, 547 F.Supp. 1221 (A-44 to A-61). The Court of Appeals for the Second Circuit affirmed the result in ALPA, 4/ but reversed the judgment in Thurston and entered judgment

---

3/ Cross-respondent Parkhill, another former TWA Captain who was involuntarily retired at age sixty, later joined as a plaintiff (J.A. 4).

4/ The union has not sought review of the decision in ALPA.

for the Thurston respondents and EEOC claimants, 713 F.2d 940 (A-1 to A-36). TWA's petition for a writ of certiorari was granted on February 27, 1984 (No. 83-997). While TWA's petition was pending, ALPA filed a conditional cross-petition, seeking review of certain issues in the event that TWA's petition was granted.

REASONS THE WRIT SHOULD NOT BE GRANTED

ALPA seeks to expand the proceedings in this Court by raising a spurious defense which is contrary to well-established ADEA principles. Further, ALPA's cross-petition is based on the erroneous premise that a labor organization may be held liable for age discrimination only where the employer also has violated the law. The Court

should decline to consider these issues. ALPA did not seek review in a petition of its own.

A. ALPA May Not Assert A "BFOQ-By-Analogy" Defense

ALPA urges the Court to find that employees who are in a position that is subject to an age-based BFOQ are barred from transferring to a position for which no BFOQ exists. 5/ The Court of Appeals rejected this contention:

> ALPA's argument is unpersuasive. The terms of §623(f)(1) plainly reveal its purpose, which is to excuse only those age-based actions against employees that are related

---

5/ The parties agreed, for purposes of this litigation, that the FAA's Age 60 Rule, 14 C.F.R. §121.383(c), created a BFOQ for the positions of Captain and co-pilot (A-7). The issue has never been squarely addressed by any court.

to the "particular job" (in this case captain or first officer)....

That age less than 60 is a BFOQ for the particular job of captain or first officer provides no license for TWA to discriminate against those over 60 who wish to transfer to positions as flight engineers, for which age 60 is not a BFOQ, by permitting other captains and first officers to do so. To hold otherwise would frustrate the purpose of the ADEA, which is "to promote employment of older persons' and "to prohibit arbitrary age discrimination in employment," 29 U.S.C. §621(b), and the purpose of the 1978 amendments, which is "to protect older workers from involuntary retirement,...to insure that older individuals who desire to work will not be denied employment opportunities solely on the basis of age." S. Rep. No. 493, [95th Cong., 2d Sess.] at 1, reprinted in 1978 U.S. Code Cong. & Ad. News 504; see also H.R. Rep. No. 527, [95th Cong., 1st Sess.] at 1, 2.

...ALPA's expansive reading of §623(f)(1) does not comply with these expressed purposes of ADEA. On the contrary it would create an exception that would swallow the Act. Under ALPA's interpretation,

for example, a company could lawfully provide fewer retirement benefits to captains retiring at age 60 than to other retiring employees, simply because the position of captain is subject to an age 60 BFOQ. Clearly Congress did not intend to permit such a result any more than it intended to permit an age-based refusal to consider a transfer application submitted by a 60-year old downbidding captain for a flight engineer position, merely because age 60 is a BFOQ for the captain's former job, when the company permits all younger captains who can no longer serve as captains to transfer to the position of flight engineer.

(A-28 to A-29). This holding is consistent with the uniform construction of the BFOQ provision in other court decisions.

The BFOQ defense is "an extremely narrow exception to the general prohibition against age discrimination (A-21); Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (see

discrimination). 6/ Courts construing the BFOQ defense found required employers 7/ to prove that the restriction is justified for the particular job in question. The Eighth Circuit Court of Appeals, construing the BFOQ defense, held that "the plain meaning of the phrase is that age can be considered relevant in an occupation within the

---

6/ "The [substantive] prohibitions of the ADEA were derived in haec verba from Title VII" of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Lorillard v. Pons, 434 U.S. 575, 584 (1978).

7/ There is a threshold question whether a labor organization may assert a BFOQ where the employer has refused to establish a "qualification" for the position. The ADEA provides that "It shall not be unlawful for an employer...to take any action otherwise prohibited...where age is a [BFOQ]." 29 U.S.C. §623(f)(1). Prohibited employer actions include, inter alia, failure to hire, refusal to hire, or discharge on the basis of age. 29 U.S.C. §623(a). ALPA's "defense" is not based on any "action otherwise prohibited," but rather on TWA's determination that it would employ persons over sixty under certain circumstances. See A-19 to A-20.

particular business." The Court went on to hold that an ordinance requiring the retirement of "all uniformed fire employees" at age 65 did not permit a city to retire a fire chief who was fully able to perform his job. EEOC v. City of St. Paul, 671 F.2d 1162, 1165-66 (8th Cir. 1982). In a similar case, the Court of Appeals for the Seventh Circuit found that a retirement age of 55 for federally-employed firefighters did not establish a BFOQ for municipal firefighters. Orzel v. City of Wauwatosa Fire Department, 697 F.2d 743, 749 (7th Cir.), cert. denied, 104 S.Ct. 484 (1983); see EEOC v. County of Los Angeles, 706 F.2d 1039, 1041-42 (9th Cir. 1983), cert. denied, 104 S.Ct. 984 (1984) (maximum hiring age for helicopter pilots).

In cases involving pilots, courts have rejected employers' use of the FAA's Age 60 Rule as a basis for requiring the retirement of flight engineers not covered by the rule.8/ See Criswell v. Western Air Lines, Inc., 709 F.2d 544, 551 (9th Cir. 1983); Monroe v. United Air Lines, Inc., 27 Empl.Prac.Dec. [CCH] ¶32,230 (N.D. Ill. 1981).9/ Similarly, in an action brought by a corporate pilot who was required to retire at age sixty, the Sixth Circuit

---

8/ Both ALPA (Cross-Pet. at 4) and TWA (Pet. at 5-6) concede that the FAA Rule does not apply to the flight engineer position.

9/ The Monroe court, subsequently affirming a jury verdict for plaintiffs, independently found that age 60 was not a BFOQ for flight engineers. Monroe v. United Air Lines, Inc., 31 Empl.Prac.Dec. [CCH] ¶33,330 (N.D. Ill. 1983), appls. pending, Nos. 83-1245 et al. (7th Cir.). ALPA was a third-party defendant in Monroe and participated fully at the trial in that case, see A-18.

reversed summary judgment for the employer, holding that "[t]he Age 60 Rule which the FAA has never seen fit to apply to corporate pilots does not foreclose further inquiry." Tousby v. Ford Motor Co., 675 F.2d 842, 845 (6th Cir. 1982). Accord, Gathercole v. Global Associates, 560 F.Supp. 642, 644-45 (N.D. Cal. 1983), appls. pending, Nos. 83-1885 et al. (9th Cir.).

The Court of Appeals' holding here is fully consistent with the decisions of other courts. ALPA offers no authority to the contrary, nor has it provided any other reason why this Court should revisit the BFOQ by-analogy defense. Certiorari should not be granted on ALPA's meritless contention.

B. ALPA Is Independently Liable For Age Discrimination

The Second Circuit found that ALPA's actions with respect to age-sixty crewmembers violated ADEA §4(c)(3), 29 U.S.C. §623(c)(3). 10/ ALPA appears to contest this finding on the basis that it can only be held liable in the event that TWA is also found to have violated the ADEA. This contention is erroneous.

Although relatively few ADEA cases have involved union liability issues, decisions under the analogous provisions of Title VII 11/ establish that labor organizations and employers may be held separately liable for employment discrimination. See, e.g., James v. Stockham Valves & Fittings Co., 559 F.2d 310, 353 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978); Farmer v. ARA Services, Inc., 660 F.2d 1096, 1104 (6th Cir. 1981); Sears v. Atchison, T. & S. F. Ry. Co., 645 F.2d 1365, 1374-75 (10th Cir. 1981), cert. denied, 102 S.Ct. 2045 (1982).

Here the Court of Appeals held that ALPA's participation in a collective bargaining agreement containing an unlawful practice rendered it "independently liable" for an ADEA violation (A-32, emphasis added). The opinion also assessed liability on the basis of other actions taken by the union: "ALPA actively

10/ The Thurston respondents alleged willful violations of 29 U.S.C. §623(c)(1), (2), (3), and (d) by ALPA (J.A. 58, 66). They respectfully submit that the facts found by the Court of Appeals support liability under each of these provisions.

11/ See note 6, supra.

campaigned to persuade TWA to retain its age-60 retirement policy for all flight deck positions, opposed TWA's unilateral action in August 1978 to attempt partial compliance with the ADEA and induced TWA to impose further discriminatory restrictions on captains seeking to downbid to flight engineer status...." (A-32 to A-33; see also A-11).

Since ALPA's substantive contentions are without merit, and since ALPA did not seek review of the liability issue in a petition of its own, it should not be permitted to expand the proceedings in this Court by raising new issues in a cross-petition.

CONCLUSION

For the foregoing reasons, the Thurston respondents respectfully request that certiorari be denied.

Respectfully submitted,

Raymond C. Fay
(Counsel of Record)
Alan M. Serwer
Susan D. Goland
HALEY, BADER & POTTS
11 S. LaSalle St., #1603
Chicago, IL 60603
(312) 782-7416

Attorneys for Cross-Respondents Harold H. Thurston, Christopher J. Clark, & C. A. Parkhill

March, 1984

REPLY

BRIEF

(5)

No. 83-1325

Office - Supreme Court, U.S.
FILED
MAR 27 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Cross-Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and TRANS WORLD AIRLINES, INC.,

Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR A WRIT OF CERTIORARI

MICHAEL E. ABRAM
(Counsel of Record)
JAY P. LEVY-WARREN
COHEN, WEISS AND SIMON
330 West 42nd Street
New York, New York 10036
(212) 563-4100

Counsel for Cross-Petitioner Air Line Pilots Association, International

12 pp

TABLE OF AUTHORITIES

CASES	PAGE
Air Line Pilots Association, International v. Trans World Airlines, Inc., 713 F.2d 940 (2d Cir. 1983), cert. granted, 52 U.S.L.W. 3624 (Feb. 27, 1984).....	passim
Allied Chemical & Alkali Workers of America, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).....	5

STATUTES	
Age Discrimination in Employment Act, 29 U.S.C. §621 et seq.	passim

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

NO. 83-1325

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

PETITIONER

v.

HAROLD H. THURSTON, ET AL.,

RESPONDENTS

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR CERTIORARI

The primary employment practice at issue in Trans World Airlines, Inc. v. Thurston, No. 83-997, is the policy adopted by Trans World Airlines, Inc. ("TWA") in August, 1978, to allow those flight deck crew members in flight engineer positions (which are not subject to the FAA Age 60 Rule) to continue in employment past age 60, and to terminate Captains and First Officers who had not transferred to flight engineer

positions, prior to disqualification by the FAA Age 60 Rule. The Second Circuit held this policy to be unlawful, and rejected the statutory defenses offered by TWA, 713 F.2d at 953, and ALPA, 713 F.2d at 953-954.

The Second Circuit further held that ALPA had violated §4(c)(3) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §623(c)(3), by entering into a collective bargaining agreement in July, 1979, which ratified TWA's August, 1978, policy; by causing TWA to adopt a "fulfill bids in a timely manner" modification of its policy after January, 1980; and by unsuccessfully seeking to have TWA continue mandatory retirement at age 60 for all flight deck crew members, and opposing the August, 1978 policy. 713 F.2d at 956.

The only issue raised in this cross-petition is the lawfulness of the employment practices under review in TWA v. Thurston, No. 83-997. The EEOC, which

represents seven terminated Captains and a larger group of successfully downbidding Captains, concedes that the question presented in this cross-petition is "comprised within that question [question 3][1] presented in the original petition [No. 83-997]." EEOC Memo at 2. The EEOC does not dispute the position asserted by ALPA, and supported by TWA in its response to this cross-petition, that this "cross-petition will not substantially expand the proceedings before this Court." Cross-Pet. at 10. Rather, the EEOC argues that "this court's consideration of this cross-petition will have no effect on cross-petitioner's right to present arguments on this issue to the Court in its brief on the merits in TWA v. Thurston, No. 83-997." EEOC Memo at 4.

---

1 "Whether the Age Discrimination in Employment Act requires an employer to accommodate employees for an age-related reason merely because it provides accommodation for non-age-related reasons?"

As a practical matter, to grant this cross-petition will permit a more orderly briefing of these issues than to defer consideration of the cross-petition and have ALPA make its arguments in its brief on the merits as a respondent in No. 83-997. All legal arguments in support of TWA's employment practices can be made at the same time; the briefs of plaintiffs-respondents can respond to the arguments actually made to this Court, rather than address the anticipated arguments of a defendant-respondent.

The alternative position of the EEOC, to deny the cross-petition on the merits, is utterly unfounded. The EEOC requests the Court to address the merits of an issue which ALPA has not yet had the opportunity to brief, after arguing that ALPA is entitled to that opportunity under the Rules

of this Court.[2] Furthermore, a rejection of the arguments advanced by ALPA in the Court below is not dispositive of the issue presented in the cross-petition, which is the lawfulness of TWA's employment practices. Even if this Court found no merit in the legal arguments asserted by ALPA in support

---

[2] In brief, the argument on the merits by ALPA turns on the legislative history of the 1978 amendments to the ADEA. In 1978, Congress both restricted the scope of mandatory retirement pursuant to a bona fide employee benefit plan, and plainly demonstrated its intent to authorize mandatory retirement at an age which is a BFOQ. Given that retirement refers to the complete termination of the employment relationship without any expectancy of future employment, see, e.g., Allied Chemical & Alkali Workers of America, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 168 (1971), the "mandatory retirement" authorized by Congress in 1978 encompasses the termination of seniority rights. In effect, the EEOC seeks to engraft a limitation on §4(f)(1) of the ADEA, 29 U.S.C. §623(f)(1) ("provided that employees subject to a BFOQ may not be terminated if any other employees have been permitted to transfer from that position to a position not subject to that BFOQ") that Congress declined to enact.

of TWA's policies, it must still consider the merits with respect to the third question presented in No. 83-997 to determine the merits of the cross-petition. Since summary judgment against ALPA rested in substantial part on the determination that ALPA caused TWA to engage in unlawful conduct which injured the EEOC plaintiffs, 713 F.2d at 956, a decision favorable to petitioner in No. 83-997 with respect to the third question presented would require reversal of the summary judgment against both defendants.

The three individual plaintiffs dispute that the summary judgment decision against ALPA is dependent on the lawfulness of TWA's employment practices.[3] This is

---

[3]Individual plaintiffs also mischaracterize the position taken by ALPA in their counter-statement of the issue presented. ALPA does not claim in its cross-petition that a BFOQ applies to flight engineers. Rather, it asserts that Congress intended that the BFOQ which undisputedly applies to Captains authorizes mandatory retirement of Captains.

absurd. The Second Circuit specifically held that ALPA violated §4(c)(3) of the ADEA, not §4(c)(1) or §4(c)(2). Section 4(c)(3) expressly links union liability to unlawful conduct by an employer, by making it unlawful for a union "to cause to attempt to cause an employer to discriminate against an individual in violation of this section." 29 U.S.C. §623(c)(3) (emphasis added). In each of the cases cited by plaintiffs, union liability was premised on entering into collective bargaining agreements which embodied unlawful employment practices. As plaintiffs concede, liability in the instant case is also premised on ALPA's entering into the 1979 collective bargaining agreement, which has been held to have ratified the August, 1978 policy adopted by TWA.[4] Thurston Brief at

---

[4]TWA management employees testified (in depositions), without contradiction, that ALPA played no role in formulating that August 10, 1978 policy. Deposition of J. Killy at 1051; J.E. Frankum at 203, 206.

13. If that August 1978 policy is found to be lawful by this Court in No. 83-997, ALPA's ratification of that policy could not have caused TWA "to discriminate...in violation" of the ADEA.

In any event, the three individual plaintiffs could not have been injured by the conduct held to be unlawful. The Second Circuit held that ALPA conduct only injured certain EEOC plaintiffs:

> Since ALPA actively campaigned to persuade TWA to retain its age-60 retirement policy for all flight deck positions, opposed TWA's unilateral action in August 1978 to attempt partial compliance with the ADEA and induced TWA to impose further discriminatory restrictions on captains seeking to downbid to flight engineer status, ALPA is liable under 29 U.S.C. §623(c)(3) to the EEOC plaintiffs who were damaged by its conduct.[19]
>
> • • •
>
> [19] Our conclusion that ALPA's actions in signing the post-1978 Working Agreements and in causing TWA to implement other restrictions on the downbidding older captains and flight engineers render it liable under §623(c)(3) makes it

> unnecessary for us to consider whether the First Amendment bars consideration of ALPA's liability based on its filing a lawsuit against TWA. See California Motor Transport v. Trucking Unlimited, 404 U.S. 508 (1972).

713 F.2d at 956 and n.19 (emphasis added). Each individual plaintiff was terminated by TWA prior to October 1, 1978, long before ALPA agreed to the July, 1979 collective bargaining agreement, or requested TWA to make the "fulfill bids in a timely manner" modification implemented after January, 1980. Even if ALPA unsuccessfully attempted to cause TWA to engage in unlawful acts against <u>other</u> employees, plaintiffs have not suffered any injury by that conduct if they were terminated by TWA for reason which this Court finds to be lawful in No. 83-997.

CONCLUSION

For the foregoing reasons, this cross-petition should be granted.

Dated: March, 1984

Respectfully submitted,

MICHAEL E. ABRAM
(Counsel of Record)
JAY P. LEVY-WARREN
COHEN, WEISS and SIMON
330 West 42nd Street
New York, New York 10036
Tel. (212) 563-4100

Attorneys for Cross-Petitioner Air Line Pilots Association, International

MOTION

MOTION FILED
MAY 9 1984

Nos. 83-997, 83-1325 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

v.

TRANS WORLD AIRLINES, INC.

(ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT)

MOTION OF UNITED AIR LINES, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF AMICUS CURIAE OF UNITED AIRLINES, INC.

EDWARD L. FOOTE
Counsel of Record
EDWARD J. WINDROW
Winston & Strawn
One First National Plaza
Suite 5000
Chicago, Illinois 60603
312/558-5600

STEPHEN SAWYER
P. O. Box 66100
Chicago, Illinois 60606

Attorneys for United Air Lines Inc.

Parallel Midwest, Inc., Chicago • 454-7600

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

v.

TRANS WORLD AIRLINES, INC.

(ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT)

MOTION OF UNITED AIR LINES, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE

THE NATURE OF UNITED AIR LINES, INC'S.[1] INTEREST

United Air Lines Inc. ("United") operates the largest airline in the United States and has a direct interest in the

---

[1] United Air Lines, Inc. is a corporation, and its parent corporation is UAL Inc. with offices at 1200 Algonquin Road, Elk Grove, Illinois 60666.

holding this Court will make, relevant to the first question to be disposed of under the petition for certiorari of Trans World Airlines, Inc. ("TWA"), as to what constitutes a "wilful" violation of the Age Discrimination in Employment Act ("ADEA"). (29 U.S.C. § 621-634.) This interest arises because of the following facts.

United and the Air Line Pilots Association, International ("ALPA"), were sued by 112 plaintiffs in the United States District Court for the Northern District of Illinois for violating the ADEA because of United's policy which has required "Second Officers" (flight engineers who are required by United to be pilot trained) to retire at age 60. There were two classes of plaintiffs. The *Monroe* plaintiffs were Second Officers who wished to continue employment after age 60. The *Higman* plaintiffs were Captains or First Officers (pilots charged with flying the aircraft) who wished to "downbid" to Second Officers, using their seniority to "bump" active flight engineers,[2] because they could no longer serve as pilots or co-pilots after age 60 under an industry-wide FAA safety rule. (14 C.F.R. § 121.383(c).)

Among the defenses asserted by United was that being under age 60 was a bona fide occupational qualification ("BFOQ") for all members of the cockpit crew, pilots and flight engineers alike, under 20 U.S.C. § 623(f)(1). United's evidence showed that in 1960 it had established the policy that all crew members must retire at age 60 for safety reasons. This was seventeen years before the ADEA was enacted, and nine years before the FAA adopted the rule prohibiting Captains and First Officers from serving after age 60 for safety reasons. Prior to an April 6, 1978 amendment, United was permitted to retire crew members at age 60 under its pension plan. *United Air Lines* v. *McMann*, 434 U.S. 192 (1977). After the pension

[2] Under United's agreement with ALPA, Captains and First Officers could not downbid to Second Officers before or upon reaching 60, and "career" Second Officers had to retire at age 60 under United's under-60 cockpit rule.

plan exemption was repealed by Congress, United continued its age 60 policy as to Second Officers for what it continued to perceive as reasons of safety.

The case was tried before a jury which returned verdicts in favor of all 112 plaintiffs. United was also found guilty of a willful violation, and double damage judgments were entered totalling $18,092,637.62. The District Court had instructed the jury that a violation was willful "if the unlawful action taken is knowing and voluntary, and United knew or reasonably should have known that its actions violated the ADEA." This instruction followed a test laid down by the Court of Appeals for the Seventh Circuit in *Syvock* v. *Milwaukee Boiler Mfg. Co., Inc.*, 665 F.2d 149, 155 (C.A. 7, 1981). The jury's finding of willfulness as to both classes of plaintiffs was sustained by the District Court.

The trial judge said that United "would also know" that a prior decision of another judge, denying plaintiffs a preliminary injunction because they had no "reasonable probability of ultimate success on the merits", had been "erroneous" and that United's failure to modify its collective bargaining agreement when it knew or should have known that it was violating the ADEA (as the jury subsequently decided) also showed willfulness. (32 F.E.P. cases 1256, at 1257 and fn. 2).

United and ALPA have appealed the judgments to the United States Court of Appeals for the Seventh Circuit. (Docket Nos. 83-1245, 83-1273, 83-1305, 83-1498). That Court presently has these appeals under advisement.

Consent to the filing of a brief amicus curiae by United Air Lines, Inc., has been refused by a party to this case.

REASONS FOR BELIEVING THAT THE WILLFULNESS ISSUE WILL NOT BE ADEQUATELY PRESENTED BY THE PARTIES.

United has discriminated because of age but has asserted a BFOQ defense as to all plaintiffs.[3] "An age-related BFOQ permits an employer to admit that he has discriminated on the basis of age, but to avoid any penalty." *Marshall* v. *Westinghouse Electric Corp.*, 576 F.2d 588 (C.A. 5, 1978). Since United "voluntarily" and "knowingly" adopted its age 60 policy in the 1950s, it is United's position that the issue of willfulness as applied to a BFOQ defense must necessarily involve factors other than "knowing" and "voluntary" action; otherwise, the BFOQ defense automatically results in a willful violation if the BFOQ defense is not accepted.

TWA is not raising a BFOQ defense in this Court[4] and therefore the question of willfulness is posed—and may be considered by this Court—in a context which fails to consider the important situation of the application of the willfulness issue to a BFOQ defense. In short, under the questions presented by the TWA petition (No. 1; pp. 9-12), were willfulness to be established by a simple showing of specific intent, then when any BFOQ defense fails the violation will be perforce equated with a willful violation, although the statute clearly intends to distinguish between the two.

TWA's certiorari petition demonstrates considerable conflict and confusion in the lower courts as to the proper definition of "willful" in an action under the ADEA.[5] However, no

[3] United's trial resulted in an evidence transcript of about 7,000 pages, much of it medical, and hundreds of exhibits, addressed to the question whether age 60 is a justifiable age at which, for reasons of public safety, to exclude flight personnel from operating in the cockpit of a jet airliner.

[4] It was raised by ALPA in the Court of Appeals but that Court held *inter alia* that it lacked jurisdiction to entertain ALPA's claim. 32 EPD ¶ 33,757, pp. 30,634-6.

[5] This confusion and conflict is even greater than TWA's petition indicates. See: 55 ALR Fed. 604: "Award of Liquidated Damages Under § 7 of Age Discrimination In Employment Act of 1967 (29 USC § 626) For 'Willful' Violations Of The Act."

reported case, so far as United is aware, has considered under what circumstances a violation is "willful" when, as in United's case, there is intentional age discrimination that is claimed to be justified under the BFOQ defense; also, whether compliance with a collective bargaining agreement containing an age-neutral bona fide seniority system constitutes a reasonable factor other than age defense to a charge of "willfulness."

Because United apprehends that "intentional" age discrimination may be erroneously equated with "willful" age discrimination under the presentation made by TWA, it wishes an opportunity to state its views to the Court respecting the interpretation that should be given to the word "willful" in ADEA cases, lest the Court formulate a rule which fails to treat the particular situation of an age-based policy with the special consideration it requires.

WHEREFORE, it is requested that this Court grant leave to United Air Lines, Inc. to file the Brief *amicus curiae* which accompanies this motion.

Respectfully submitted,

EDWARD L. FOOTE,

Counsel of Record for United Air Lines, Inc.

TABLE OF CONTENTS

	PAGE(S)
INTEREST OF AMICUS CURIAE	i, 1
REASONS FOR BELIEVING THAT THE WILLFULNESS ISSUE WILL NOT BE ADEQUATELY PRESENTED BY THE PARTIES	iv
SUMMARY OF ARGUMENT	2
ARGUMENT	3
CONCLUSION	7

TABLE OF AUTHORITIES

	PAGE(S)
Cases	
Crews v. *United States*, 325 U.S. 91, 101 (1945)	5
Fountain v. *United States*, 96 U.S. 699, 702 (1877)	4
Heikkinen v. *United States*, 355 U.S. 273, 279 (1958)	5
Hertzel v. *United States*, 322 U.S. 680, 686 (1944)	5
Frank Irey, Jr, Inc. v. *OSHA*, 519 F.2d 1200, 1207 C.A. 3, 1974), *aff'd en banc* 519 F.2d 1215 C.A. 3, 1975), *aff'd on other grounds*, 430 U.S. 442 (1977)	5n
Marshall v. *Westinghouse Electric Corp.*, 577 F.2d 588 (C.A. 5 1978)	iv
Morissette v. *United States*, 342 U.S. 246, 264 (1952)	5
Orzell v. *City of Wauwatosa Fire Department*, 697 F.2d 743, 759 (C.A. 7, 1983), *cert. den.*	3
Potter v. *United States*, 155 U.S. 438, 446 (1894)	5
Spies v. *United States*, 317 U.S. 492, 497 (1943)	4
Spurr v. *United States*, 174 U.S. 728, 734 (1899)	4
Syvock v. *Milwaukee Boiler Mfg. Co. Inc.*, 665 F.2d 149, 155 (C.A. 7, 1981)	iii, 3
United Air Lines v. *McMann*, 434 U.S. 192 (1977)	ii
United States v. *Illinois Central Ry. Co.*, 303 U.S. 239, 243 (1958)	5, 7
United States v. *Pomponio*, 429 U.S. 10, 12 (1976)	5
Wehr v. *Burroughs Corp.*, 619 F.2d 276, 282 (1980)	5

PAGE(S)

Miscellaneous

Annotation, "Award of Liquidated Damages Under § 7 of Age Discrimination in Employment Act of 1967 (29 U.S.C. § 626) For 'Willful' Violations of the Act", 55 ALR Fed. 604 (1981) iv, v
Restatement of the Law of Torts (2d), § 12 4
14 C.F.R. § 121.383(c) ii

Nos. 83-997, 83-1325 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

v.

TRANS WORLD AIRLINES, INC.

(ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT)

BRIEF AMICUS CURIAE OF UNITED AIRLINES, INC.

THE INTEREST OF UNITED IN THIS CASE.

The interest of United Air Lines, Inc. ("United") in this case is set forth in the motion for leave to file this Brief. In sum, a judgment of over $18,000,000, including $9,000,000 resulting from a determination of "willfulness," has been entered against United in the United States District Court for the Northern District of Illinois. The appeal from this judgment is now under advisement by the United States Court of Appeals for the

Seventh Circuit. One of the issues urged is that United had in no event willfully violated the Age Discrimination in Employment Act ("ADEA"), but had, long before the ADEA and in the interest of public safety, adopted an under-60 rule as a bona fide occupational qualification ("FBOQ") for every person (Captain, Co-Pilot and Flight Engineer) in the cockpit of its jet liners, similar to the industry-wide rule subsequently adopted by the FAA which forbids the Captain and Co-Pilot from being over 60 years of age.

United is, thus, acutely interested in the ruling which this Court may make in respect to the first question presented by the petition for certiorari of Trans World Airlines Inc. ("TWA") relating to the meaning of a "willful" violation of the ADEA.

SUMMARY OF ARGUMENT.

If, on the basis of substantial medical evidence, an employer reasonably believes that unpredictable physically disabling events happen to personnel more frequently with increasing age, and if the duties of the personnel involved relate entirely to the safety of the public, then the adoption of an express age-based retirement rule should not subject the employer to punitive double recovery, even though a trier of fact may ultimately decide in favor of plaintiffs despite the defense that the age specified is a valid occupational qualification.

The general test of "willfulness" under the ADEA, which can henceforth serve all varieties of cases arising under the Act, should require a finding *of deliberate disregard of the law with the purpose to evade its known requirements.*

ARGUMENT.

This Court should not adopt a definition of "willful" under the ADEA that would permit the finder of fact to find that an intentional age-based policy constituted a "willful" violation of the Act even though the employer had a reasonable and good faith belief that the policy was an occupational qualification.

The certiorari petition of TWA shows that the lower courts have adopted various standards to determine "willfulness" under the ADEA. *Inter alia* it urges a test found in the opinion of the Seventh Circuit Court of Appeals. It quotes at page 10 that "a finding of willfulness should lie *only* if there is some showing as to the defendant's *knowledge of the illegality* of his actions." *Sysock* v. *Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 155 (C.A. 7, 1981). But the sentence which the petition quotes is followed by the sentence:

> "We hold that, in order to prove willfulness under (29 U.S.C. § 626(b) (1976)), a plaintiff must show that the defendant's actions were knowing and voluntary and that he knew or reasonably should have known that those actions violated the ADEA."

This latter is the instruction which was given the jury in the case against United and on the basis of which a finding of "willful" violation was made.

Such a test, or a comparable one, is easily subject to misinterpretation by a jury or the lower courts. The "reasonably should have known" alternative cancels out the test of knowing and deliberate violation, stated in the preceding sentence, and, in effect, permits a negligence test. (*E.g., Orzell* v. *City of Wauwatosa Fire Department*, 697 F.2d 743, 759 (C.A. 7, 1983), *cert. den.* 11/28/83, Docket No. 83-205—"reasonably should have known.") " 'Should know' indicates that the actor is under a duty to another to use reasonable diligence to ascertain the existence or non-existence of the fact in question and that he would ascertain the existence

thereof in the proper performance of that duty." "*Restatement of the Law of Torts (2d)*, § 12.

Many of the tests formulated by some of the lower courts are implicitly, and sometimes explicitly, based on the following reasoning: Everyone is charged with knowing the law; what the defendant did, it did intentionally; therefore, if it violated the Act, it "willfully" violated the Act. The practical *result* of many decisions in the lower courts is to make a doubling of recovery almost automatic, once a violation has been shown.

Although any test that this Court may lay down is capable of being misinterpreted or wrongfully applied by a court or jury, the *Syvock* test led to a finding of willfulness by a jury in *United*'s case that was sustained by the District Court notwithstanding: (a) that United's age 60 policy preceded the ADEA by seventeen years and the FAA's own age 60 rule for Pilots and Co-Pilots by nine years; (b) that a district judge had denied a preliminary injunction on the grounds that plaintiffs probably would not prevail at a trial in showing a violation of the Act; and (c) that United was barred from transferring the pilot plaintiffs down to Second Officers (Flight Engineers) by its age-neutral collective bargaining agreement with Air Line Pilots Association, International ("ALPA"). Because United's policy was expressly based on age, it was undeniably intentional, and this sufficed to make it "willful" for purposes of punitive double recovery.

This Court has stated that "willful" "is a word of many meanings, its construction often being influenced by its context" (*Spies* v. *United States*, 317 U.S. 492, 497 (1943)) and has discussed the meaning of the word "willful" several times in criminal cases.

In *Fountain* v. *United States*, 96 U.S. 699, 702 (1877) and *Spurr* v. *United States*, 174 U.S. 728, 734 (1899), this Court quoted from authorities which stated that the word "willful" "in the ordinary sense in which it is used in statutes means not

merely 'voluntarily but with a bad purpose' " and that the word is frequently understood "as signifying an evil intent without justifiable excuse." See also, *Potter* v. *United States*, 155 U.S. 438, 446 (1984) (willful " 'implies knowledge and a purpose to do wrong' "); *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976) ("willfully" filing a false income tax return means "an intentional violation of a known legal duty"); *Hertzel* v. *United States*, 322 U.S. 680, 686 (1944); *Crews* v. *United States*, 325 U.S. 91, 101 (1945); *Morissette* v. *United States*, 342 U.S. 246, 264 (1952); *Heikkinen* v. *United States*, 355 U.S. 273, 279 (1958).

Only once, so far as we can ascertain, has this Court considered the meaning of "willful" in a civil action. In *United States* v. *Illinois Central Ry. Co.*, 303 U.S. 239, 243 (1958), it was said that the word "means purposely or obstinately and it is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements."*

The word "willful" is not defined in the ADEA. Moreover, "A review of the legislative history of the ADEA and its assimilated acts uncovers nothing helpful on [the question of willfulness.]" *Weke* v. *Burroughs Corp.*, 619 F.2d 276, 282 (C.A. 3, 1980).**

---

* At least one Court of Appeals has applied a "deliberate flaunting of the Act" test for a "willful" violation of the Occupational Safety and Health Act (OSHA). (29 U.S.C. § 666; 29 U.S.C. § 651 et seq.) *Frank Irey, Jr., Inc.* v. *OSHA*, 519 F.2d 1200, 1207 (C.A. 3, 1974) *aff'd en banc* 519 F.2d 1215 (C.A. 3, 1975) *aff'd on other grounds*, 430 U.S. 442 (1977).

** The House Report merely repeats the words of the statute. H.R. No. 805 to accompany H.R. 13054, U.S. Code Congressional and Administrative News, 90th Cong. 1st Sess. (1967) Vol. 2, pp. 2218, 2222.

Similarly, Congress, in passing the 1978 amendments, threw no light on the meaning of "willful." It stated, "[ADEA] includes

(Footnote continued on following page)

The word "willful", however it may be defined by this Court, should be given a definition that will accommodate the defenses permitted under the ADEA and utilized in good faith by the employer and which will not automatically permit a finding of "willful" violation if the trier of fact* fails to regard the defenses as having been proven.

United's BFOQ defense based on the policy that no one over 60 years of age should be an active member of the cockpit crew of a jet liner is just such a defense. (29 U.S.C. § 623(f)(1).)

Also, United asserted a reasonable factor other than age ("RFOA") defense under 29 U.S.C. § 623(f)(2), that the bona fide seniority system established by its collective bargaining contract with ALPA barred all "downbidding" (with only a few, non-age related exceptions), including to Second Officer status by Captains and Co-Pilots who seek, after their age 60, to use their seniority to "bump" active Second Officers. Any such practice would be a breach of a labor contract which was age-neutral in all its provisions. Yet the trial judge in *United's* case upheld the jury finding of willfulness because he considered it "willful" for United not to have modified its collective bargaining contract.

Obviously, Congress, in providing for double damages for "willful" violation, intended to create two classes of violators, one "willful" and the other "non-willful." An age policy is necessarily adopted with specific intent to discriminate on the basis of age, but the act permits such a policy if it can be justified as of a bona fide occupational qualification. If the trier of fact finds that the policy meets this requirement, there is, of

---

(Footnote continued from preceding page)

liquidated damages" (calculated as an amount equal to the pecuniary loss) "which compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA." H. Cong. Report No. 95-950, 95th Cong. 2d. Sess. 13 (1978). Reprinted in Volume 3 U.S. Code Congressional and Administrative News, p. 528 at 535.

* There is a right to jury trial in ADEA cases. 29 U.S.C. § 626(c)(2).

course, no liability. But the trier of fact may also find that such a policy, even though adopted and continued in good faith, and without a bad purpose or a plain indifference to the law, is not an occupational qualification sufficiently proven to deny all recovery to plaintiffs. This should not automatically subject the employer to double damages.

CONCLUSION

The word "willful" in the ADEA should be defined by this Court in such a way as to preclude a trier of fact from finding a "willful" violation merely because an age policy was intentionally adopted, if the trier further finds that the age policy was adopted by the employer in the good faith belief that being under a certain age is a reasonable occupational qualification for the job involved or that age-neutral contract provisions preventing job-change down-bumping by anyone (including persons legally disqualified for one job after a certain age) must be adhered to.

The definition already laid down by this Court in *United States* v. *Illinois Central R.R. Co.*, 303 U.S. 239, 243 (1958) would have this effect and would not only encompass the 'knowledge of illegality' test urged by TWA but also constitute an unambiguous general rule for application in all ADEA cases.

Respectfully submitted,

EDWARD L. FOOTE,

Counsel of Record for
United Air Lines, Inc.

PETITIONER'S

BRIEF

Nos. 83-997, 83-1325

Office - Supreme Court, U.S.
FILED
SEP 17 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and TRANS WORLD AIRLINES, INC.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF TRANS WORLD AIRLINES, INC.
Petitioner in No. 83-997
Respondent in No. 83-1325

DONALD I STRAUBER
PETER N. HILLMAN
CHADBOURNE, PARKE, WHITESIDE & WOLFF
Of Counsel

HENRY J. OECHSLER, JR.
30 Rockefeller Plaza
New York, N.Y. 10112
(212) 541-5800
Counsel of Record for Trans World Airlines, Inc.

QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act requires an employer to accommodate employees for an age-related reason merely because it provides accommodation for non-age-related reasons?

2. Whether specific intent to discriminate is necessary to establish a "willful" violation under the Age Discrimination in Employment Act?

3. Whether a labor union which jointly violates the Age Discrimination in Employment Act with an employer is absolved as a matter of law from liability for back pay?

PARTIES

Trans World Airlines, Inc., Harold H. Thurston, Christopher J. Clark, C.A. Parkhill and the Air Line Pilots Association, International are parties to the decision sought to be reviewed here. In addition, the Equal Employment Opportunity Commission and Nicholas Vasilaros, *et al.*, were intervenors in the court below.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES	i
TABLE OF AUTHORITIES	vi
PRELIMINARY STATEMENT	2
OPINIONS BELOW	2
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	5
A. The Origin of the Case	5
B. TWA's Corporate Policy and the Subsequent Lawsuits	7
C. The Operation of TWA's "Age 60" Policy	8
D. Refinements to TWA's Policy	10
E. Non-Age Accommodations in the Working Agreement	12
F. The Thurston and EEOC Plaintiffs	13
G. The Decisions Below	13
SUMMARY OF ARGUMENT	15
ARGUMENT	16
I. THE MAJORITY BELOW HAS ADOPTED A STANDARD FOR LIABILITY UNDER THE ADEA WHICH IS CONTRARY TO CONGRESSIONAL INTENT AND ESTABLISHED LAW	16

PAGE

A. The Majority's Basis for Liability Is Predicated Upon a Misunderstanding as to What the ADEA Requires 16

B. Applying the General Standard of Liability in Employment Discrimination Cases, TWA Has Complied With the ADEA..... 22

1. The Plaintiffs Cannot Establish a Prima Facie Case 23

2. Even If Plaintiffs Have Established a Prima Facie Case, TWA Has Provided a Legitimate, Nondiscriminatory Reason for Its Actions 26

3. The Plaintiffs Cannot Show That TWA's Policy Was a Pretext..... 29

II. THE TEST FOR "WILLFULNESS" UNDER THE ADEA SHOULD REQUIRE PROOF OF SPECIFIC INTENT TO DISCRIMINATE..... 30

A. The Decision Below..... 30

B. Liquidated Damages and the Two-Tiered Level of Liability..... 31

C. The Plain Language of the ADEA Supports Such a Test..... 32

D. The Legislative History Supports Requiring Specific Intent to Discriminate 33

III. ASSUMING THERE IS A VIOLATION OF THE ADEA HERE, A CO-DEFENDANT UNION SHOULD BE JOINTLY LIABLE WITH THE EMPLOYER FOR MONETARY RELIEF 38

A. The Holding of the Court Below 38

B. The Holding Urged by Petitioner Is Supported by the Clear Purposes of the ADEA 39

PAGE

C. Holding Unions Responsible for Monetary Liability Under the ADEA Would Be Consistent With Other National Labor Laws..... 41

D. Holding Unions Accountable Is Consonant With the "Make Whole" Remedial Concept of Employment Discrimination Law 43

CONCLUSION..... 45

TABLE OF AUTHORITIES

Cases — PAGE

Acha v. *Beame*, 570 F.2d 57 (2d Cir. 1978) 27

Aero Mayflower Transit Co. v. *ICC*, 535 F.2d 997 (7th Cir. 1976) 33

Albermarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) ..43, 44

Aldendifer v. *Continental Airlines*, 19 FEP Cases 1090 (C.D. Cal. 1978), *aff'd on other grounds*, 650 F.2d 171 (9th Cir. 1981) 26

American Tobacco Co. v. *Patterson*, 456 U.S. 63 (1982) 25

Balmer v. *Community House Association*, 572 F. Supp. 1048 (E.D. Mich. 1983) 35

Blackwell v. *Sun Electric Corp.*, 696 F.2d 1176 (6th Cir. 1983) 36

Bowen v. *United States Postal Service*, ___ U.S. ___, 103 S. Ct. 588 (1983) 42, 43

Brennan v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057 (S.D.N.Y. 1975) 38

Brennan v. *Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974) 27

Brody v. *President of Harvard College*, 27 FEP Cases 496 (D. Mass. 1980), *aff'd*, 664 F.2d 10 (1st Cir. 1981), *cert. denied*, 455 U.S. 1027 (1982) 24

Brotherhood of Railroad Trainmen v. *Chicago R. & I. Railroad*, 353 U.S. 30 (1957) 21

Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156 (1962) 21

Cafferty v. *TWA*, 488 F. Supp. 1076 (W.D. Mo. 1980) .. 8

PAGE

California Brewers Association v. *Bryant*, 444 U.S. 598 (1980) 25, 29

Cates v. *TWA*, 561 F.2d 1064 (2d Cir. 1977) 24, 27

Cova v. *Coca-Cola Bottling Co.*, 574 F.2d 958 (8th Cir. 1978) 19

Crosland v. *Charlotte Eye, Ear and Throat Hospital*, 686 F.2d 208 (4th Cir. 1982) 33

Czosek v. *O'Mara*, 397 U.S. 25 (1970) 42

Dean v. *American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978) ... 34

Donnell v. *General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978) 42

Duffy v. *Wheeling Pittsburgh Steel Corp.*, 33 FEP Cases 730 (E.D. Pa. 1983) 37

EEOC v. *ALPA*, 489 F. Supp. 1003 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981) 38, 40, 41

EEOC v. *Allstate Insurance Co.*, 570 F. Supp. 1224 (S.D. Miss.), *appeal filed*, 52 U.S.L.W. 3512 (Dec. 15, 1983) 8

EEOC v. *Frontier Airlines, Inc.*, 673 F.2d 1155 (10th Cir. 1982) 22, 29

EEOC v. *TWA*, 544 F. Supp. 1187 (S.D.N.Y. 1982) 24

EEOC v. *Wyoming*, ___ U.S. ___, 103 S. Ct. 1054 (1983) 19, 26

Elliot v. *Group Medical & Surgical Service*, 714 F.2d 556 (5th Cir. 1983) 37

Ford Motor Co. v. *EEOC*, 458 U.S. 219 (1982) 20

PAGE

Furnco Construction Corp. v. *Waters*, 438 U.S. 567 (1978) 20, 21, 23

Garner v. *Boorstin*, 690 F.2d 1034 (D.C. Cir. 1982) 22

Gibson v. *Mohawk Rubber Co.*, 695 F.2d 1093 (8th Cir. 1982) 22

Gifford v. *B.D. Diagnostics*, 458 F. Supp. 462 (N.D. Ohio 1978) 35

Goodman v. *Heublein, Inc.*, 645 F.2d 127 (2d Cir. 1981) 37

Guardians Association v. *Civil Service Commission*, ___ U.S. ___, 103 S. Ct. 3221 (1983) 36

Hazen v. *Welch*, 303 U.S. 303 (1938) 37

Hays v. *Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976) 35, 37

Hedrick v. *Hercules, Inc.*, 658 F.2d 1088 (5th Cir. 1981) 37

Hodgson v. *Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), *aff'd sub nom. Hodgson* v. *Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972) 42, 44

Humphrey v. *Moore*, 375 U.S. 335 (1964) 25

INS v. *Chadha*, ___ U.S. ___, 103 S. Ct. 2764 (1983) 8

Jensen v. *Gulf Oil Refining & Marketing Co.*, 623 F.2d 406 (5th Cir. 1980) 27

Johnson v. *Mayor of Baltimore*, ___ F.2d ___, 34 FEP Cases 854 (4th Cir. 1984) 19, 28

Kelly v. *American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981) 33, 36

Keyes v. *Consolidated Edison Co.*, 560 F. Supp. 1161 (S.D.N.Y. 1983) 32

Krieg v. *Paul Revere Life Insurance Co.*, 718 F.2d 998 (11th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 1712 (1984) 22

PAGE

Lake Shore & Michigan Southern Railway v. *Prentice*, 147 U.S. 101 (1893) 35

Lee v. *Southern Home Sites Corp.*, 429 F.2d 290 (5th Cir. 1970) 35

Lieberman v. *Gant*, 630 F.2d 60 (2d Cir. 1980) 27

Loeb v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979) 32

Lorillard v. *Pons*, 434 U.S. 575 (1978) ..... *passim*

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 22, 23, 24, 30

Massarsky v. *General Motors Corp.*, 706 F.2d 111 (3d Cir.), *cert. denied*, ___ U.S. ___, 104 S. Ct. 348 (1983) 22

Murdock v. *NCR Corp.*, 586 F.2d 1096 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979) 27

Nesman v. *Northwest Airlines, Inc.*, 28 FEP Cases 1488 (N.D. Ill. 1982) 38, 40

Northcross v. *Memphis Board of Education*, 412 U.S. 427 (1973) 42

Northwest Airlines, Inc. v. *TWU*, 451 U.S. 77 (1981) .. 38

Orzel v. *City of Wauwatosa Fire Department*, 697 F.2d 743 (7th Cir.), *cert. denied*, ___ U.S. ___, 104 S. Ct. 484 (1983) 32

Parcinski v. *Outlet Co.*, 673 F.2d 34 (2d Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S. Ct. 725 (1983) 18

Personnel Administrator of Massachusetts v. *Feeney*, 442 U.S. 256 (1979) 36

Pirone v. *Home Insurance Co.*, 559 F. Supp. 306 (S.D.N.Y. 1983) 19

Powell v. *Syracuse University*, 580 F.2d 1150 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978) 26, 27

PAGE

Quinn v. *New York State Electric & Gas Corp.*, 569 F. Supp. 655 (N.D.N.Y. 1983) 43

Reilly v. *Friedman's Express, Inc.*, 556 F. Supp. 618 (M.D. Pa. 1983) 19, 25

Rodriguez v. *Taylor*, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) 43

Rogers v. *Exxon Research & Engineering Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) 34, 35

Russell v. *American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976) 42

Sears v. *Atchison, T. & S. F. Railway*, 645 F.2d 1365 (10th Cir. 1981), *cert. denied*, 456 U.S. 964 (1982) ... 42

Smith v. *University of North Carolina*, 632 F.2d 316 (4th Cir. 1980) 27

Smith v. *World Book-Childcraft International, Inc.*, 502 F. Supp. 96 (N.D. Ill. 1980) 26

Spiers v. *United States*, 317 U.S. 492 (1943) 32

Spruck v. *Milwaukee Boiler Mfg. Co.*, 665 F.2d 149 (7th Cir. 1981) 31, 32, 36

Teamsters v. *United States*, 431 U.S. 324 (1977) ... 22, 24, 26

Texas Dep't of Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 22, 26, 29, 30

TWA v. *Hardison*, 432 U.S. 63 (1977) 25

United Air Lines, Inc. v. *McMann*, 434 U.S. 192 (1977) 5, 27

United States v. *Campos-Serrano*, 404 U.S. 293 (1971) 33

United States v. *Murdock*, 290 U.S. 389 (1933) 36

United States Postal Service Board of Governors v. *Aikens*, ___ U.S. ___, 103 S. Ct. 1478 (1983) 22

PAGE

Usery v. *Allegheny County Institution District*, 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977) 41

Usery v. *Pilgrim Equipment Co.*, 527 F.2d 1308 (5th Cir.), *cert. denied*, 429 U.S. 826 (1976) 40

Vaca v. *Sipes*, 386 U.S. 171 (1967) 39, 42

Vance v. *Bradley*, 440 U.S. 93 (1979) 19

Wehr v. *Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980) 33, 36

Whitfield v. *Union Carbide Corp.*, 567 F. Supp. 1320 (S.D.N.Y. 1983) 32

Williams v. *General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) 18, 23

Statutes

Age Discrimination in Employment Act:
Section 2(b), 29 U.S.C. § 621(b) 39
Section 4(a), 29 U.S.C. § 623(a) 2
Section 4(c), 29 U.S.C. § 623(c) 3, 39
Section 4(d), 29 U.S.C. § 623(d) 39
Section 4(e), 29 U.S.C. § 623(e) 39
Section 4(f), 29 U.S.C. § 623(f) ..... *passim*
Section 7(b), 29 U.S.C. § 626(b) ..... *passim*
Section 8, 29 U.S.C. § 627 39
Section 12(a), 29 U.S.C. § 631(a) 5

Equal Pay Act, 29 U.S.C. § 206(d) 38, 41, 42, 44

Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ... *passim*

Federal Aviation Act:
Section 601(b), 49 U.S.C. § 1421(b) 29

Interstate Commerce Act:
Section 212(a), 49 U.S.C. § 312(a) 33

Labor Management Relations Act:
Section 301, 29 U.S.C. § 185 42

PAGE

Railway Labor Act, 45 U.S.C. § 151 *et seq.* 8, 21, 42

Title VII, Civil Rights Act of 1964,
42 U.S.C. § 2000e *et seq.* .....*passim*

28 U.S.C. § 1254(1) 2

Regulations

14 C.F.R. § 67.13 12
14 C.F.R. § 67.15 12
14 C.F.R. § 121.383(c) 5, 6

29 C.F.R. § 1625.2(a) 20

Legislative Sources

113 Cong. Rec. 2199 (1967) 34
113 Cong. Rec. 2467 (1967) 41
113 Cong. Rec. 7076 (1967) 34
113 Cong. Rec. 7077 (1967) 34
113 Cong. Rec. 31,253 (1967) 19
113 Cong. Rec. 31,254 (1967) 35
113 Cong. Rec. 34,740 (1967) 41
113 Cong. Rec. 34,743 (1967) 41
123 Cong. Rec. 34,318 (1977) 19, 28

H.R. Rep. No. 95-527, 95th Cong., 1st Sess. (1977). ...18, 28

Pub. L. No. 93-259, § 28, 88 Stat. 73 37
Pub. L. No. 95-256, 92 Stat. 189 5

Articles

Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837 (1982) 22

Smith & Leggette, *Recent Issues in Litigation Under the Age Discrimination in Employment Act*, 41 Ohio St. L. J. 349 (1980) 35

PAGE

Treatises

22 Am. Jur. 2d *Damages* § 256 (1965) 35

25 C.J.S. *Damages* § 123(1) (1966) 35

In the

Supreme Court of the United States

October Term, 1983

Nos. 83-997, 83-1325

Trans World Airlines, Inc.,

Petitioner,

—v.—

Harold H. Thurston, Christopher J. Clark, C.A. Parrish, Equal Employment Opportunity Commission and Air Line Pilots Association, International,

Respondents.

Air Line Pilots Association, International,

Petitioner,

—v.—

Harold H. Thurston, Christopher J. Clark, C.A. Parrish, Equal Employment Opportunity Commission and Trans World Airlines, Inc.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF TRANS WORLD AIRLINES, INC.
Petitioner in No. 83-997
Respondent in No. 83-1325

PRELIMINARY STATEMENT

Trans World Airlines, Inc. ("TWA"),[1] petitioner in No. 83-997 and respondent in No. 83-1325, respectfully submits this brief on the merits in these consolidated cases.[2]

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 713 F.2d 940 and appears in the appendix to TWA's petition for certiorari in No. 83-997 at page A-1. The opinion of the United States District Court for the Southern District of New York is officially reported at 547 F. Supp. 1221 and appears in the same appendix at page A-46.

JURISDICTION

This Court's jurisdiction exists by virtue of 28 U.S.C. § 1254(1). TWA petitioned this Court for a writ of certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Second Circuit. The Air Line Pilots Association, International ("ALPA") subsequently filed a conditional cross-petition. Both petitions were filed within 90 days of the denial of rehearing by the Court of Appeals. TWA's petition was granted on February 27, 1984 (52 U.S.L.W. 3631), and ALPA's petition was granted on April 2, 1984 (52 U.S.L.W. 3720).

STATUTES AND REGULATIONS INVOLVED

Section 4(a) of the Age Discrimination in Employment Act ("ADEA") provides (29 U.S.C. § 623(a)):

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with

---

1 TWA has no parent, subsidiary or affiliate required to be reported under Rule 28.1 of this Court. Effective February 1, 1984, TWA was divested from Trans World Corporation.

2 Cases No. 83-997 and No. 83-1325 were consolidated pursuant to an order of this Court entered on April 2, 1984 (52 U.S.L.W. 3720).

> respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this Act.

Section 4(c) of the ADEA provides (29 U.S.C. § 623(c)):

> It shall be unlawful for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;
>
> (2) to limit, segregate, or classify its membership, or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Sections 4(f)(1) and (2) of the ADEA provide (29 U.S.C. §§ 623(f)(1) and (2)):

> It shall not be unlawful for an employer, employment agency or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual.

Section 7(b) of the ADEA provides (29 U.S.C. § 626(b)):

> The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): *Provided*, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

Section 12(a) of the ADEA provides (29 U.S.C. § 631(a)):

> The prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

Part 121.383(c) of the Federal Air Regulations provides (14 C.F.R. § 121.383(c)):

> No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

STATEMENT OF THE CASE

A. The Origin of the Case

This case has its genesis in the passage of the 1978 amendments to the ADEA that were signed into law on April 6, 1978. Pub. L. No. 95-256, 92 Stat. 189. These amendments prohibit, *inter alia*, an employee's involuntary retirement before the age of 70 by reason of a bona fide employee benefit plan.[3] The ADEA, however, still allows retirement before the age of 70 where:

> (1) "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business;"

---

3 Prior to the 1978 amendments, the ADEA had been interpreted to permit mandatory retirement at an age earlier than the statutory minimum of 65 if this was part of a bona fide employee benefit plan (such as a retirement, pension or insurance plan) and was not a subterfuge to evade the purposes of the ADEA. *See United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977). TWA's Retirement Plan is such a bona fide plan (J.A. 242, ¶ 5).

References to "J.A. ____" are to the Joint Appendix filed in the Second Circuit and part of the record below. By order dated March 19, 1984 (52 U.S.L.W. 3687), this Court granted the parties' motion to dispense with printing a new joint appendix, and all the parties have agreed to cite to the Joint Appendix below.

(2) "where the differentiation is based on reasonable factors other than age;" or

(3) where the retirement is in accordance with (i) "the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan;" (ii) is "not a subterfuge to evade the purposes of [the ADEA];" and (iii) is not as a result "of the age of [the] individual." (29 U.S.C. § 623(f)).

Because of these amendments, TWA began a review of its pilot collective bargaining agreement (which includes the pilot Retirement Plan) in order to ensure that the Company was complying with the new statute. Section 4.1 of the Retirement Plan provides that the "normal retirement date" for a pilot is his 60th birthday, and Section 4.2 says that pilots "must retire by their normal retirement date unless written approval of the Company is granted for continuance in employment." (J.A. 242, ¶¶ 4, 6; J.A. 410).

These two provisions have been in the Retirement Plan for many years, and at the time of the 1978 ADEA amendments, no one had served in a TWA cockpit beyond the age of 60 for at least two decades (J.A. 243, ¶ 7). Insofar as Captains and First Officers (co-pilots) are concerned, a regulation of the Federal Aviation Administration ("FAA") requires that "[n]o person may serve as a pilot . . . if that person has reached his 60th birthday" (14 C.F.R. § 121.383(c)). All parties agree that such an age limitation is a "bona fide occupational qualification" ("BFOQ") for the purposes of the ADEA (A-7 to A-8).[4]

However, on most jet aircraft, there is also a Flight Engineer who "is primarily responsible for pre-flight inspection and in-flight monitoring of the mechanical, electrical and electronic functioning of the aircraft." (A-6).[5] There is no FAA regulation

4 References to "A..." are to the decisions below which appear in the appendix to TWA's petition for certiorari filed December 16, 1983.

5 On a few long flights, TWA also has an International Relief Officer ("IRO"). An arbitrator has ruled that an IRO essentially "relieves the Flight Engineer" (J.A. 607), although he can perform limited First Officer functions (J.A. 311, ¶ 2).

limiting that position to persons below the age of 60 (A-7). TWA therefore had to determine whether, in light of the 1978 ADEA amendments, Flight Engineers remained subject to mandatory retirement at age 60 (J.A. 243, ¶ 10).

B. TWA's Corporate Policy and the Subsequent Lawsuits

As part of its examination of the age 60 question, TWA met on several occasions with ALPA, the union representing all of TWA's flight crewmembers and the union with which TWA has a collective bargaining agreement ("Working Agreement").[6] It was clear from these meetings, however, that significant differences separated the parties (J.A. 243, ¶ 11). ALPA took the position that allowing anyone to serve in the cockpit beyond age 60 was not permitted under the Working Agreement and was not mandated by the ADEA. TWA contended that, as to Flight Engineers, service beyond age 60 was required by the new law (J.A. 1046-47, 1050-51).

On August 10, 1978, TWA finalized its position on the ADEA amendments and formally announced its corporate policy (J.A. 425). That policy was set forth in a telex posted for all TWA flight personnel (J.A. 243-44, ¶ 12). The bulletin stated that "any cockpit crew member who [was] in a Flight Engineer status at age 60 may not be compelled to retire." The policy also announced that those who wanted to work beyond age 60 would "be governed by the provisions of the current Working Agreement . . ." (J.A. 425). TWA thereby became the only trunk airline which voluntarily permitted former Captains to serve as Flight Engineers past age 60 (J.A. 487-88, 492, No. 12).

On the same day that TWA announced its policy, ALPA filed

6 Excerpts from the 1977 and 1979 Working Agreements are included at J.A. 250-400. (Any change in the 1979 Agreement from the 1977 version is noted by a line on the side of the text.) A new Working Agreement was also signed in April 1982 (A-46 n.2). In the Working Agreement, the word "pilot" is often used to comprise all flight deck crewmembers, including Flight Engineers (A-6 n.4).

suit against the Company in *ALPA* v. *TWA*.[7] The complaint alleged that TWA had gone too far by allowing anyone to serve in the cockpit past age 60. This was alleged to be a breach of the Working Agreement and a violation of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA") (J.A. 108-15).

Soon thereafter, several TWA Captains mandatorily retired at age 60 because there were no Flight Engineer vacancies prior to their 60th birthday also filed suit in *Thurston* v. *TWA and ALPA*. Their complaint alleged, *inter alia*, that TWA's "age 60" policy had not gone far enough to accommodate them and was therefore in violation of the ADEA (J.A. 58-73). The Equal Employment Opportunity Commission ("EEOC"), purporting to represent others similarly situated, intervened in *Thurston* as a plaintiff intervenor,[8] and *Thurston* was consolidated with *ALPA* (J.A. 457-58).[9]

C. The Operation of TWA's "Age 60" Policy

The August 10, 1978 bulletin which announced TWA's "age 60" policy was posted at all pilot domiciles. The announcement informed the pilot work force that:

---

7 A group of "career" or permanent Flight Engineers, Nicholas Stefanou, *et al.*, was permitted to intervene in *ALPA* v. *TWA* (A-48). Since they intervened on the side of the Company, they are not respondents here.

8 In view of this Court's recent decision in *INS* v. *Chadha*, ___ U.S. ___, 103 S. Ct. 2764 (1983), and the subsequent discussion in *EEOC* v. *Allstate Ins. Co.*, 570 F. Supp. 1224 (S.D. Miss.), *appeal filed*, 52 U.S.L.W. 3012 (Dec. 15, 1983), a threshold question arises whether the EEOC has the authority to enforce the ADEA. The issue was not considered below because briefs and oral arguments were completed prior to this Court's decision in *Chadha*. TWA reserves all rights in this regard in the event the case is remanded for further proceedings.

9 There was also consolidated at the same time a third case, *Caffery* v. *TWA*. This case was originally brought in the Western District of Missouri by a group of TWA Flight Engineers at the bottom of the pilot seniority list. They alleged they had been furloughed because of TWA's policy of allowing Flight Engineers to serve beyond age 60. After their motion for a preliminary injunction was denied (488 F. Supp. 1078), the case was transferred to New York and was ultimately dismissed on August 28, 1981 (J.A. 451-53, 459-60). The plaintiffs did not appeal.

> (1) "It [was] the Company's opinion that [the ADEA] amendments became effective April 6, 1978;"
>
> (2) "Any cockpit crewmember who [was] in a Flight Engineer station at age 60 may not be compelled to retire;"
>
> (3) "The terms and conditions of employment for Flight Engineers who elect to work beyond age 60 [would] be governed by the provisions of the current Working Agreement;" and
>
> (4) "Flight Engineers [would] be subject to the provisions of the Federal Air Regulations applicable to TWA's operations and as such [could] not under any circumstances serve as a pilot after attaining age 60." (J.A. 425).

Subsequent to the posting of the bulletin, TWA sought to implement the policy as soon as possible. As the Second Circuit stated, "TWA immediately reinstated those who had been in flight engineer status on their 60th birthdays and had been retired after April 6, 1978. Flight Engineers reaching their 60th birthday after August 10, 1978 continued in that status." (A-9). Captains seeking to become Flight Engineers (and thereby avail themselves of an opportunity to work beyond age 60) could change their status to Flight Engineer "in accordance with the seniority and bidding procedures of the Working Agreement." (A-9).

The bidding procedures of the Working Agreement are the heart of the contractual seniority system and serve as the basic mechanism in deploying the pilot work force (J.A. 185, ¶ 3). The bidding procedures are outlined in Section 19 of the Working Agreement and apply to any TWA pilot, irrespective of age, who seeks to change status or location (domicile) (J.A. 185, ¶ 4).

In order to bid, a pilot normally files a "Standing Bid" showing his present status and domicile and listing his request (in order of preference) for a new status (J.A. 185, ¶ 5; 466). The Company is required under Section 19(C)(1) of the Working Agreement to "publish bulletins announcing vacancies

. . ." (J.A. 304). In such a bulletin (J.A. 470), the Company lists available vacancies on which pilots can bid, and vacancies are awarded in order of seniority (J.A. 185, ¶ 6).[10] Depending on staffing needs, there may be vacancies for Captains, First Officers and Flight Engineers at all the pilot domiciles, or the vacancies may be limited to less than all the available statuses or domiciles (J.A. 185-86, ¶ 7). In virtually any bidding situation where there is a vacancy, certain pilots will be awarded their bids, and others will be denied their bids. In each instance, however, the selection process is based on a pilot's seniority, *i.e.*, the date of hire with the Company (J.A. 186, ¶ 8).

If a Captain wishes to downbid to Flight Engineer, he files a bid for a Flight Engineer vacancy. If there is such a vacancy at the domicile where a downbidding Captain has requested to be assigned and that Captain has the highest seniority, then he is granted the bid in accordance with the provisions of the Working Agreement (J.A. 186-87, ¶ 11).[11]

As the Second Circuit recognized, "[m]ost of the 70 captains and first officers who have downbid for flight engineer positions successfully obtained that status before reaching 60." (A-10). Indeed, 83% of those Captains seeking to serve beyond age 60 have succeeded in that regard (A-61 n.8). In addition, there are over ninety "career" Flight Engineers who are serving or have served beyond age 60 (J.A. 189, ¶ 18).

D. Refinements to TWA's Policy

Since the adoption of TWA's policy, the procedure has remained essentially the same. Downbidding Captains bid for

---

10 Section 15(A)(3) of the Working Agreement specifically says that "[s]eniority shall govern all pilots in . . . their choice of vacancies, provided that the pilot's qualifications are sufficient for the operation to which he is to be assigned." (J.A. 294).

11 A summary of the bidding procedure is contained in the district court's decision (A-60). The "seniority system and the bidding procedures have existed at TWA since before 1967" (A-60), *i.e.*, before the passage of the ADEA or its 1978 amendments.

Flight Engineers, and once the bid has been awarded, each Captain is notified by form letter of the training requirements for Flight Engineer (J.A. 473-74). Of particular importance is the need to take and pass the FAA Flight Engineer written exam which has always been a prerequisite for entering Flight Engineer training.

In January 1980, the Company adopted a procedure of sending a separate form letter informing a downbidding Captain of the date of his Flight Engineer class (J.A. 477). The letter also notified him that if he failed to have proof of successful completion, his Flight Engineer bid would be cancelled. If otherwise qualified, he could return to the Captain status where he would be eligible to bid for another Flight Engineer vacancy (J.A. 188-89, ¶¶ 16-17).[12]

At about the same time, the Company also required that Captains be trained, whenever possible, prior to the effective date of their Flight Engineer bids so that they could fulfill their Flight Engineer bids in a timely manner (A-10 n.9). Previously, the Company had often permitted downbidding Captains to be trained after the effective date of their bids. However, ALPA brought to the Company's attention that this resulted in favoring downbidding Captains over the rest of the pilot work force who were normally required to be trained in a timely fashion so as to fulfill their bids on the effective date. In order to treat everyone equally, therefore, the Company's policy was changed so "that downbidding Captains be trained just like the rest of the pilot work force" (J.A. 859, No. 12; 6; 1068-69).[13]

---

12 This procedure, criticized by the majority below (A-12), is consistent with the Company's long-standing policy that if a pilot cannot qualify in a new status (in this case, Flight Engineer), then he reverts to his old status (in this case, Captain) (J.A. 188-89, ¶ 17). It was done to treat all pilots similarly situated in an equal fashion.

None of the current plaintiffs was impacted by this procedure. The two who alleged they were adversely affected by this procedure, W.T. Emrich and J.L. Clark (A-57 n.6), "have since settled" with TWA (A-60 n.10).

13 This change was also criticized by the majority below, particularly because of what it viewed as a premature reduction in pay for downbidding Captains (A-11 to A-12). However, the problem is exactly the converse: prior

(Footnote continued on following page)

E. Non-Age Accommodations in the Working Agreement

While the bidding procedures in the Working Agreement are the heart of the contractual seniority system, there are also some provisions in the contract to accommodate certain special circumstances unrelated to age. For example, a Flight Engineer who fails to qualify as a First Officer, or a First Officer who fails to qualify as a Captain, can revert to Flight Engineer without bidding for a vacancy. However, he "shall not thereafter be eligible to exercise a bid to a higher status." (Sec. 6(B)(14); J.A. 265-66). Similarly, a Captain who cannot maintain an FAA first class medical certificate is permitted to revert to Flight Engineer without a bid provided a second class medical certificate can be obtained (Secs. 19(A)(3) and (A)(4)(a); J.A. 302).[14] In this instance, as in the previous one, the procedure is unrelated to age and applies to anyone similarly situated.

As discussed *infra*, pp. 17-18, such provisions apply just as equally to the plaintiffs as to anyone else. However, they pertain to limited situations. Particularly when viewed in the context of TWA's handling a 3,000 pilot work force every day (A-5 to A-6), the number utilizing such provisions is minute. For example, no more than two people have ever reverted to Flight Engineer as a result of the loss of a first class medical certificate (J.A. 968), and only 20 have ever reverted to Flight

to the change, Captains awarded Flight Engineer vacancies were obtaining a windfall in salary over their entitlement under the Working Agreement.

Even after the change, downbidding Captains have continued to receive the windfall of Captain's pay while in Flight Engineer training. This is because the Working Agreement requires that training pay be calculated on the basis of a pilot's prior two months' salary (Sec. 6(A)(2); J.A. 259). A downbidding Captain therefore receives more pay during Flight Engineer training than after training, but in order to apply the same pay formula to everyone equally, TWA pays its downbidding Captains in this fashion.

14 The Working Agreement says that "all pilots will be required to possess a first class medical certificate permitting the pilot to operate as pilot in command," *i.e.*, as Captain (Sec. 16(F); J.A. 292). The Federal Air Regulations specify the requirements for first class and second class medical certificates (14 C.F.R. §§ 67.13 and 67.15).

Engineer after failing to upgrade to the next higher status (J.A. 946-47).[15]

F. The Thornton and EEOC Plaintiffs

There are three named plaintiffs, H.H. Thornton, C.J. Clark and C.A. Parkhill, and seven other individuals represented by respondent EEOC (A-10 n.10). All are former TWA Captains, and as the Second Circuit recognized, all share one other crucial similarity: they "could not establish that there were flight engineer vacancies at the time they applied to transfer." (A-23). Since they could not remain in their Captain status beyond the age of 60 because of the FAA prohibition for "pilots," they were mandatorily retired.[16]

G. The Decisions Below

On the basis of these facts, the district court ruled that TWA's "age 60" policy complied with the RLA and dismissed

15 The majority's decision below also refers to the situation where "as a disciplinary measure in response to demonstrated incompetence" (A-11), TWA has transferred a pilot to a lower position for which he was qualified. This has occurred only once during the course of this litigation and involved a pilot who was already trained as a Flight Engineer and had "priority rights" convferred to ages to the Flight Engineer seat (J.A. 627-28, No. 7). None of the plaintiffs is covered by the IBC Agreements providing for such "priority rights" (J.A. 666, 682, No. 11).

16 Their retirement dates were:

Name	*Retirement Date*
A. M. Lord	May 3, 1970
L. D. Bohrin	May 9, 1970
H. H. Thornton	June 11, 1970
C.A. Parkhill	August 22, 1970
R. Cowling	August 27, 1970
C. J. Clark	September 18, 1970
F. H. Wehmeyer	November 10, 1970
A. T. Humbles	September 14, 1970
H. W. Lewis	November 24, 1980
D. V. Rogozinski	August 21, 1981

Today, all receive benefits under the Retirement Plan. Through December 31, 1981, payments totalled around $1,100,000. Each received during that period approximately $40,000-$47,000 per annum, and that amount increases each year (J.A. 950-80).

ALPA's complaint in *ALPA v. TWA* (A-30 to A-34). The court also granted TWA's motion for summary judgment in *Thurston* (A-34 to A-41). The court ruled that the plaintiffs "cannot establish a *prima facie* case of discrimination solely because no job vacancy existed at the time they applied and were eligible for the job. TWA was legally obligated to remove these pilots at age sixty under the FAA regulations. TWA was not obligated, however, to offer these ex-pilots jobs which did not exist. To the extent jobs existed, TWA was justified in relying upon a seniority bidding system." (A-37).

On appeal, the Second Circuit unanimously affirmed the district court's decision in *ALPA v. TWA* (A-13 to A-21). However, a majority of the panel reversed the district court's holding in *Thurston* and directed that summary judgment be entered in favor of the *Thurston* and EEOC plaintiffs. Judge Mansfield, in an opinion joined by the late Judge Waterman, held that "because TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers, the *Thurston* litigants and the EEOC claimants must prevail on their ADEA claim." (A-31).

In fashioning its relief against TWA, the majority ruled that TWA's actions constituted a "willful" violation under Section 7(b) of the ADEA, 29 U.S.C. § 626(b), thereby entitling plaintiffs to "[l]iquidated or double damages" (A-33). The court's finding of "willfulness" was predicated on its view that "in a case based on discriminatory treatment, such as the present one, plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." (A-33). Significant liability for liquidated damages was thus imposed against TWA even though there had never been an evidentiary hearing on the issue of intent or "willfulness."

In its initial decision, the majority also imposed money liability against ALPA. It found that while the statute "pro-

cludes a monetary damage award against ALPA," the plaintiffs were "entitled to recover back pay, an equitable remedy, against the union." (A-34). However, in a subsequent "Errata Sheet" released after the denial of the petitions for rehearing (A-37 to A-38),[17] the court deleted the entire paragraph relating to its prior holding that the plaintiffs were entitled to recover back pay from ALPA. This deletion resulted in making TWA, the employer defendant, solely liable for all payments of money under the court's ruling.

In dissent, Judge Van Graafeiland noted that the majority's attempt to compare TWA's treatment of its employees for non-age reasons with its treatment of the plaintiffs was "like comparing apples with oranges." He did not "believe" that was what "Congress intended" by its enactment of the ADEA (A-39 to A-50). He concluded:

> "Apparently, TWA is the only trunk airline that voluntarily has permitted pilots over 60 to continue working as flight engineers. Instead of receiving commendation for what it has done, TWA is held liable as a matter of law for age discrimination." (A-50).

SUMMARY OF ARGUMENT

The majority below has adopted a standard for liability under the ADEA whereby every time an employer provides an accommodation for a non-age reason it may now have to provide such accommodation for an age reason. Such a basis for liability is contrary to Congressional intent and established precedent. By having Captains bid for Flight Engineer positions in the same manner as flight deck positions are normally filled under the seniority provisions of the collective bargaining agreement, TWA treats everyone equally. That is all the ADEA requires. It certainly does not dictate that plaintiffs may enjoy a virtual guarantee of a new position based on age simply

---

[17] The actual "Errata Sheet" is printed at A-37, and the resulting changes in the decision are reflected in the markings made by TWA on the appendix of this Court at A-38 to A-39.

[illegible] to very limited and different circumstances unrelated to age, they and the rest of the pilot work force might have received accommodations enabling them to obtain Flight Engineer positions.

The majority below further erred when it found that TWA's conduct was a "willful" violation under the ADEA, thereby entitling the plaintiffs to liquidated or double damages. Such a finding was made without any hearing and on the basis of admittedly inferred conduct. Indeed, in holding there was a "willful" violation here, the majority below adopted a standard whereby once there is a finding of discriminatory treatment, liquidated damages automatically follow. That is contrary to the clear Congressional intent to establish under the ADEA a two-tiered level of liability: one non-willful and one willful. The legislative history, sound reasoning and common sense dictate that a "willful" violation should only exist where a defendant actually knew it was violating the ADEA.

Finally, the majority erred when it found that a defendant employer could not be jointly liable with an employer for money damages under the ADEA even though there was a finding of joint culpability. Holding unions liable for such damages would further the deterrent purpose of the ADEA and would be completely consistent with other national labor laws.

ARGUMENT

I. THE MAJORITY BELOW HAS ADOPTED A STANDARD FOR LIABILITY UNDER THE ADEA WHICH IS CONTRARY TO CONGRESSIONAL INTENT AND ESTABLISHED LAW

A. The Majority's Basis for Liability Is Predicated Upon a Misunderstanding as to What the ADEA Requires

The majority below held that "because TWA routinely accommodates other employees . . . *for non-age reasons*," it must "accord the *same* treatment to age-60 captains and first officers . . ." (A-31).[18] The majority is therefore apparently saying that every time an employer accommodates an employee for a non-age-related reason, it should have to provide the same accommodation to someone claiming such entitlement simply because of age.

Such reasoning inevitably creates a *new* right based on age. The plaintiffs not only get the same accommodations for non-age reasons as everyone else, but they now seek to enjoy these accommodations based on age. For example, the majority notes that a Captain unable to maintain a first class medical certificate is entitled to revert to Flight Engineer "without being required to bid for the downgraded position." (A-10). What the majority ignores is that the number of times this has ever occurred is no more than twice (J.A. 968). That is hardly the "routine" accommodation claimed by the majority (A-31). Moreover, any of the plaintiffs who had lost his first class medical certificate would have been just as entitled to revert to Flight Engineer without a bid, *supra*, p. 12. Yet the mere existence of such a procedure should not mean that the plaintiffs now acquire automatic reversion rights at age 60. That would be, as the dissent notes, "like comparing apples with oranges." (A-35 to A-36).[19]

---

18 Unless otherwise noted, emphasis in quotations is added.

19 The inappropriateness of such a comparison was also recognized by the arbitrator who decided the contractual grievance of plaintiff Thurston. While declining to rule on Captain Thurston's "legal" rights, the arbitrator specifically rejected the relevance of certain automatic downgrades (including the loss of a first class medical certificate) to the plaintiffs' situation here. "None of these provisions can be seen to have given Captain Thurston the right to automatic placement in a Flight Engineer position as claimed by grievant's counsel." (J.A. 330-31) (emphasis in original). The arbitrator, Harry T. Edwards, is now a member of the United States Court of Appeals for the District of Columbia Circuit.

In the same vein, the majority notes that a "pilot who lacks sufficient seniority to displace is not discharged. Rather, he is placed on furlough status which may extend for up to 60 years during which time he continues to accrue seniority for purposes of a recall." (A-11). From this, the majority apparently suggests that TWA should do the same for the plaintiffs

(Footnote continued on following page)

It is also contrary to the ADEA's legislative history. The House of Representatives Report accompanying the 1978 amendments specifically says that the ADEA amendments do "*not require* employers to provide *special working conditions* for older workers to allow them to remain or become employed." H.R. Rep. No. 95-527, 95th Cong., 1st Sess. 12 (1977). The same report (p.12) also states that "[w]hile . . . *retraining and transfers* to less physically demanding jobs may be of great benefit to the older employees and the employer alike, these activities *are not required* by this legislation."

Indeed, as noted in *Williams* v. *General Motors Corp.*, 656 F.2d 120, 129 n.13 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982), the principle of neutrality "flows . . . directly from the ADEA's legislative history and avowed purpose." Based on its review of the legislative history, the court concluded in *Williams* that the ADEA "does not place an affirmative duty upon an employer to accord special treatment to members of the protected age group." Instead, a person's age "is accorded neutral status under the ADEA, neither facilitating nor hindering his employment, his chances for advancement, or his exposure to demotion or discharge." (656 F.2d at 129).

That was also the standard set by the Second Circuit in *Parcinski* v. *Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S. Ct. 725 (1983). In a decision by Judge Van Graafeiland, the dissenter here, the court held that the "ADEA does not require an employer to accord special treatment to employees over forty years of age. . . . It requires, instead, that an employer's age be treated in a neutral

---

here. Of course, TWA *already* does the same for these plaintiffs because they would also have been placed on furlough if they lacked sufficient seniority to remain on the job "due to a reduction in force" (Sec. 20(A)(1); J.A. 861). Moreover, that does not mean they become eligible for a new accommodation based on age. As the dissent notes, "a 60 year old pilot should not be entitled to take a ten year furlough from a job he is forbidden by law to perform, accruing seniority status in the process. I don't believe Congress intended that such a pilot should be permitted to take a nine-year vacation and return to work at the age of 69 . . ." (A-38).

fashion, neither facilitating nor hindering advancement, demotion, or discharge."[20]

By having Captains bid for Flight Engineer openings in the same manner as flight deck positions are normally filled under the collective bargaining agreement, TWA treated everyone in just such a neutral fashion. Under TWA's policy, 83% of those Captains seeking to serve beyond age 60 have succeeded in that regard pursuant to the terms of a neutral bona fide seniority system, *infra*, p. 21.[21] Yet that is not good enough for the plaintiffs and the majority below. What plaintiffs have been

---

20 Accord, *e.g.*, *Cova* v. *Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (9th Cir. 1978); *Pirone* v. *Home Ins. Co.*, 559 F. Supp. 306, 311 (S.D.N.Y. 1983); *Reddy* v. *Freedman's Express, Inc.*, 596 F. Supp. 618, 621 (M.D. Pa. 1983).

21 When the plaintiffs were unable or unwilling to change their Captain status in accordance with the normal bidding procedures of the neutral seniority system, they were mandatorily retired at age 60 because they were in a position admittedly subject to the BFOQ provision in the ADEA (A-7 to A-8). That is consistent with this Court's recent statement in *EEOC* v. *Wyoming*, ____ U.S. ____, 103 S. Ct. 1054, 1058 (1983), that the ADEA contemplates employers being "permitted to use *neutral criteria* not directly dependent on age, and . . . that even criteria that are based on age are occasionally justified . . ." It is also consistent with the ADEA's legislative history. Senator Javits, one of the floor managers of the 1978 amendments, stated that "an employer may justify a lower age for mandatory retirement for some reason other than age—for example, for airline pilots, if age is shown to be a bona fide occupational qualification." 123 Cong. Rec. 34,318 (1977). He concluded that if "an agency with regulatory authority finds that . . . a person is unable to perform his duties as an airline pilot, the law permits that retirement." (*Id.*)

The importance of such Congressionally contemplated mandatory retirement under the ADEA was recently recognized and approved in *Johnson* v. *Mayor of Baltimore*, ____ F.2d ____, 34 FEP Cases 854, 857 (4th Cir. 1984) ("Where Congress itself has deemed age to be a *bona fide* occupational qualification for federal firefighters," mandatory retirement at age 55 for municipal firefighters was permitted under the ADEA). The same is equally applicable here for pilots. In fact, Senator Yarborough, the floor manager of the original Act in 1967, specifically used as an example of a BFOQ under the ADEA "a jet pilot who flies a plane at many hundreds of miles an hour." 113 Cong. Rec. 31,253 (1967). *Cf. also Vance* v. *Bradley*, 440 U.S. 93 (1979), where this Court upheld the legality of Congressionally established mandatory retirement for Foreign Service officers at age 60.

given by the majority is a virtual *guarantee* of a new position based on age simply because, in different and limited circumstances, similar positions were provided to a few for reasons unrelated to age. Indeed, the EEOC openly states that its plaintiffs are entitled to "*affirmative action programs*" whereby they are "*automatically* placed in a Flight Engineer position" (J.A. 841-42, No. 10).[22]

Nowhere in the ADEA's legislative history has there been suggested such an extreme standard of liability. Moreover, such a standard is contrary to what this Court has held is necessary in the related context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII").[23] In *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577-78 (1978), this Court specifically said that the law "does not impose a duty" upon an employer "to adopt a . . . procedure that maximizes" the employment opportunities of a protected class.

At the time of the ADEA amendments in 1978, TWA was faced with the difficult task of satisfying the provisions of a new law and accommodating a 3,000 pilot work force whose movements were dictated by a pre-existing Working Agreement. That is something which this Court has recognized is a valid concern when it said that "[i]n many cases, . . . disruption of the existing seniority system [would] violate a collective-bargaining agreement, with all that such a violation entails for the employer's labor relations." *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 229 (1982).

22 See also the discussion by Judge Edwards in his arbitration decision recognizing that what plaintiffs are seeking are "'extremely' rights to the Flight Engineer position, *supra*, p. 17 n.19. It is particularly ironic that the EEOC would take such a position when its very own ADEA regulations for employers prohibit "giving preference because of age" (29 C.F.R. § 1625.2(a)).

23 As this Court has said in comparing the ADEA with Title VII, "[t]here are important similarities between the two statutes . . . both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived in haec verba from Title VII." *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978).

In the face of plaintiffs' claims that everyone should be allowed to serve as Flight Engineers past 60 and ALPA's claims that no one should serve past 60, TWA met both the obligations of the new law and the legitimate considerations of the Working Agreement.[24] The following chart shows that of those Captains seeking to serve beyond age 60 from the time of the ADEA amendments in April 1978 through the end of 1981, 83% have served or are now serving as Flight Engineers:

Year	*No. of Captains Seeking to Serve as F/E Beyond Age 60*	*No. of Captains Awarded F/E Bids Who Have Served or Are Serving Beyond Age 60*	*Percent*
1978	9	2	22.2%
1979	22	21	95.5
1980	12	10	83.3
1981	27	25	92.6
Total	70	58	82.9%[25]

24 In that regard, courts are "generally less competent than employers to restructure business practices." *Furnco*, *supra*, 438 U.S. at 578. Despite this admonition, the majority's opinion ignores the need for TWA to comply with *both* the ADEA and the RLA. For TWA to have gone as far as suggested by the majority to comply with the ADEA, it faced the risk of being charged with violating Section 6 of the RLA. That section prohibits a unilateral "change in . . . rates of pay, rules, or working conditions" (45 U.S.C. § 156).

In view of ALPA's suit alleging just such a violation of the RLA (J.A. 108-15), TWA's concern was very real, and this Court has often recognized the need to accommodate conflicting federal statutes. See, *e.g.*, *Brotherhood of R.R. Trainmen* v. *Chicago R. & I. R.R.*, 353 U.S. 30, 40 (1957) ("There must be an accommodation of [the Norris-LaGuardia Act] and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved"); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 172 (1962) ("The policies of the Interstate Commerce Act and the [National Labor Relations Act] necessarily must be accommodated, one to the other"). TWA's policy represents just such an accommodation.

25 Source: J.A. 189-90, ¶¶ 19-20; 891-930. This data is "unrefined" (A.61 n.6), and the success rate is even higher (92%) if the transitional year of 1978 is excluded.

Accordingly, the fairness of TWA's policy is borne out by its actual results. This 63% success rate is convincing evidence that plaintiffs cannot prove "the ultimate question of discrimination *vel non*." *United States Postal Service Board of Governors* v. *Aikens*, ____ U.S. ____, 103 S. Ct. 1478, 1481 (1983).

B. Applying the General Standard of Liability in Employment Discrimination Cases, TWA Has Complied With the ADEA

The same nondiscriminatory conclusion is compelled by an analysis under the disparate treatment standard articulated in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-04 (1973), and reaffirmed in *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-53 (1981).[26] There, this Court summarized "the basic allocation of burdens and order of presentation of proof in a . . . . case alleging discriminatory treatment." (450 U.S. at 252). In the first instance, "the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination." (*Id.* at 252-53). If the plaintiff succeeds in that respect, then "the burden shifts to the defendant 'to articulate some legitimate,

---

26 While *McDonnell Douglas* and *Burdine* were disparate treatment cases arising under Title VII, their standard for imposing liability has been utilized in many ADEA cases. See, *e.g.*, *Garner* v. *Boorstin*, 689 F.2d 1034, 1036-37 (D.C. Cir. 1982); *Massarsky* v. *General Motors Corp.*, 706 F.2d 111, 117-19 (3d Cir.), *cert. denied*, ____ U.S. ____, 104 S. Ct. 368 (1983); *Gibson* v. *Richland Builder Co.*, 697 F.2d 1093, 1100 n.7 (6th Cir. 1982); *EEOC* v. *Trans-Air Airlines, Inc.*, 673 F.2d 1155, 1158-59 (10th Cir. 1982); *Krieg* v. *Paul Revere Life Ins. Co.*, 718 F.2d 998, 999 (11th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S. Ct. 1712 (1984).

In a disparate treatment case, "[p]roof of discriminatory motive" by the employer "is critical" to establishing liability. *Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). It is to be distinguished from claims of "disparate impact" which "involve employment practices that are facially neutral . . . but . . . fall more harshly on one group than another and cannot be justified by business necessity." (*Id.* at 336 n.15). The "disparate treatment" test is the predominant standard in ADEA cases, and it has been argued "that only disparate treatment claims should be available in age discrimination cases." Note, *Age Discrimination and the Disparate Impact Doctrine*, 54 Geo. L. Rev. 357, 810 (1982).

nondiscriminatory reasons for the employee's rejection.'" (*Id.* at 253). Finally, "should the defendant carry this burden, the plaintiff must then have an opportunity to prove . . . that the legitimate reasons . . . were a pretext for discrimination." (*Id.*)

While this test "was never intended to be rigid, mechanized or ritualistic," it can represent a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco*, *supra*, 438 U.S. at 577. Its application here convincingly shows that TWA's actions were nondiscriminatory.

1. *The Plaintiffs Cannot Establish a Prima Facie Case*

As the majority below noted, a "prima facie case of discriminatory treatment under the ADEA (as under Title VII) may ordinarily be made out by meeting the four requirements set forth in" *McDonnell Douglas* (A-23).[27] Applying the facts of this case to the general criteria in *McDonnell Douglas*, the district court properly said that in order to establish a prima facie case, a plaintiff must show:

> "1. he was a member of the protected age group;
> 2. he was terminated;
> 3. there was a vacancy in the position sought at the time he applied;
> 4. he was qualified for the position sought." (A-55).

---

27 The four *McDonnell Douglas* requirements for establishing a prima facie case include (in a Title VII context) the following:

> "(i) that he belongs to a racial minority;
> (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
> (iii) that, despite his qualifications, he was rejected; and
> (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." (411 U.S. at 802).

These standards, with modifications to meet particular situations, have often been applied in ADEA cases. See, for example, *Garner* v. *General Motors Corp.*, *supra*, 698 F.2d at 127-28, and cases cited at *supra*, p. 22, n.26.

As the district court recognized, "prongs one, two and four of the *McDonnell* test were facially satisfied" by the plaintiffs (A-56). All were "members of the protected age group, *i.e.*, between the age of forty and seventy; 29 U.S.C. § 631(a); each of them was terminated as pilots and forced to retire; most of them were 'qualified for the position sought,' *i.e.*, they were qualified to bid for and receive the position of Flight Engineer." (A-56). However, with respect to the question of an available vacancy, even the Second Circuit said "it is clear, as the district court held, that [plaintiffs] could not establish that there were flight engineer vacancies at the time they applied to transfer." (A-23).[28]

Despite this admission, the majority held that a "plaintiff is not barred by the *McDonnell Douglas* method from making out a prima facie case of age discrimination by alternative means, such as *direct* proof that an employer discriminates on the basis of age." (A-24) (emphasis in original). The majority's "evidence" in this regard was that "TWA grants the downgrading requests of all pilots with sufficient seniority except those of captains and first officers who reach age 60. This direct evidence of a differentiation based solely on age is sufficient to give rise to an inference of discriminatory motive, . . . and establishes, therefore, a prima facie case of discriminatory treatment." (A-24).[29]

---

28 See also the discussion by the district court at A-56 to A-57. The importance of the need for a vacancy to show a prima facie case was fully recognized by this Court when it said that "the *McDonnell Douglas* formula . . . does demand that the alleged discriminatee demonstrate at least that his rejection did not result from . . . *the absence of a vacancy in the job sought.*" *Teamsters* v. *United States*, *supra*, 431 U.S. at 358 n.44.

This language from *Teamsters* was recently cited with approval in another ADEA case, *EEOC* v. *TWA*, 544 F. Supp. 1187, 1218 n.323 (S.D.N.Y. 1982). See also, *e.g.*, *Brady* v. *President of Harvard College*, 27 FEP Cases 496, 499 (D. Mass. 1980), *aff'd*, 664 F.2d 10 (1st Cir. 1981), *cert. denied*, 455 U.S. 1027 (1982) (requirement of vacancy under the ADEA in order to establish prima facie case).

29 This is in contrast to what the Second Circuit had said in *Cates* v. *TWA*, 561 F.2d 1064, 1074 (2d Cir. 1977), when it observed in a Title VII case that TWA's pilot seniority system "admittedly was *not* instituted for discriminatory reasons and has not been applied in other than a neutral manner . . ." See discussion, *infra*, p. 27.

The basis for the majority's conclusion, however, is simply wrong and reflects a misunderstanding as to how a seniority system operates. As this court said in *TWA* v. *Hardison*, 432 U.S. 63, 79, 81 (1977), seniority in the collective bargaining context "lies at the core of our national labor policy" and "seniority systems are afforded special treatment" under the law. This is because of their "overriding importance" in collective bargaining since they "determine who gets or who keeps an available job." *Humphrey* v. *Moore*, 375 U.S. 335, 346-47 (1964).[30] Implicit in that statement is this Court's recognition that in any seniority system, not everyone gets what he or she wants. TWA's pilot seniority system is no exception (J.A. 186, ¶ 8). This was recognized by the district court when it said that "in any bidding situation for a vacancy, the bidders frequently outnumber the vacancies and not all bids can be accommodated." (A-48).

As a result, the district court properly held that the plaintiffs "cannot establish a *prima facie* case of discrimination solely because no job vacancy existed at the time they applied and were eligible for the job. TWA was legally obligated to remove these pilots at age sixty under the FAA regulations. TWA was not obligated, however, to offer these ex-pilots jobs which did not exist. To the extent jobs existed, TWA was justified in relying upon a seniority bidding system." (A-57).[31]

---

30 These principles were reiterated in *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 76-77 (1982). They are also consistent with this Court's holding in *California Brewers Ass'n* v. *Bryant*, 444 U.S. 598, 608 (1980), that courts should not "second guess" such seniority systems, "reflecting as they do . . . the specific characteristics of a particular business or industry . . ." Such comments are particularly appropriate to seniority systems of commercial airlines which are all subject to the unique requirements of FAA safety regulations.

31 A recent district court decision has also viewed the lack of a vacancy as a possible determinative factor in rejecting a plaintiff's claims of age discrimination. In *Reilly* v. *Friedman's Express, Inc.*, *supra*, 556 F. Supp. 618, the plaintiffs alleged that they had applied for the disputed positions. In considering this question, the court noted that "[a] concomitant requirement with the need for the plaintiff to apply for that job is that a job actually exists. . . . *For if no job exists, it would be impossible for a plaintiff to prove he was not hired because of his age.*" (*Id.* at 623).

(Footnote continued on following page)

2. *Even If Plaintiffs Have Established a Prima Facie Case, TWA Has Provided a Legitimate, Nondiscriminatory Reason for Its Actions*

Even if, as the majority holds (A-24), plaintiffs have established a prima facie case, the neutral bidding procedure of the Working Agreement is a "legitimate, nondiscriminatory" reason for TWA's actions.[32]

In rejecting such a reason (A-25 to A-26), the majority ignored this Court's ruling in *Burdine* that the threshold necessary for an employer to show a "legitimate, nondiscriminatory" reason is not onerous. "The defendant need not persuade the court that it was actually motivated by the proffered reasons . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." (450 U.S. at 254-55).

This low threshold has been held to apply equally in ADEA cases. The Second Circuit has itself said that "the law does not require, in the first instance, that employment be rational, wise or well-considered—only that it be nondiscriminatory." *Powell* v. *Syracuse University*, 580 F.2d 1150, 1156-57 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978). Accord, *e.g.*, *Smith* v. *University of North Carolina*, 632 F.2d 316, 346 (4th Cir. 1980); see also, *e.g.*, *Lieberman* v. *Gant*, 630 F.2d 60, 65 (2d Cir. 1980) (Title VII) ("It is enough for the defendants . . . to bring forth evidence that they acted on a neutral basis").

Clearly, TWA's "proffered" reason more than satisfies the necessary threshold. Not only did the district court recognize that TWA's seniority system "was instituted for nondiscriminatory reasons and . . . applied in a neutral manner" (A-60), but so has the Second Circuit itself in *Cates* v. *TWA*, *supra*, 561 F.2d at 1074. The court there stated that "the operation of the seniority system" in the TWA pilot Working Agreement "admittedly was not instituted for discriminatory reasons and has not been applied in other than a neutral manner . . ." "[I]ncorporated" in the Working Agreement, the seniority system "governs each pilot's job assignments . . . [and] eligibility for transfer," *Cates*, *supra*, at 1065. It "was instituted well before the effective date of the ADEA amendments and *is not in any way predicated upon age*; rather, it depends solely on length of service with the company." (A-60) (see also *Cates*, *supra*, 561 F.2d at 1066; Sec. 17(A)(1); J.A. 294).[33]

As its basis for this statement, the court relied on this Court's language in *Teamsters* on the need for a "vacancy," *supra*, p. 24, n.28, and also on *Smith* v. *World Book-Childcraft International, Inc.*, 502 F. Supp. 96 (N.D. Ill. 1980). There, the plaintiff was a branch manager in Illinois who had been terminated by the employer. As part of his ADEA complaint, he "allege[d] that he applied and was qualified for an available branch manager's position" in Knoxville, Tennessee (*id.* at 99). In rejecting his claims, the court ruled "that the position to which [plaintiff] requested transferral was unavailable at the time of his request. Consequently, it would be impossible for [plaintiff] to prove that World Book's failure to transfer him to Knoxville was predicated upon impermissible factors such as age." (*Id.*)

32 The legitimacy of this reason stems from the ADEA's protection in Section 4(f) (2), 29 U.S.C. § 623(f) (2), for "observ[ing] the terms of a bona fide seniority system." TWA's policy can also be viewed as "based on reasonable factors other than age" under Section 4(f) (1) of the ADEA, 29 U.S.C. § 623(f) (1). *Cf.*, *e.g.*, *EEOC* v. *Wyoming*, *supra*, 103 S. Ct. at 1058; *Aldendifer* v. *Continental Airlines*, 19 FEP Cases 1090, 1096 (C.D. Cal. 1978), *aff'd on other grounds*, 650 F.2d 171 (9th Cir. 1981).

33 A bona fide seniority system requires that it be "applied fairly and impartially to all employees, that it not have its 'genesis in [unlawful] discrimination,' and that it be maintained free from illegal purposes." *Acha* v. *Beame*, 570 F.2d 57, 64 (2d Cir. 1978) (brackets in original). See also, *e.g.*, *Morelock* v. *NCR Corp.*, 586 F.2d 1096, 1105-06 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979).

The seniority system of the TWA Working Agreement clearly meets all of these criteria. The system is neutral on its face and in its application, *Cates* v. *TWA*, *supra*, 561 F.2d at 1074, and it was designed at a time when the ADEA was not even enacted (A-48; J.A. 186, ¶ 9). The Working Agreement has adhered ever since to the same basic seniority system, which has been negotiated and maintained free from consideration of age (J.A. 186, ¶ 8).

The Working Agreement is also not a "subterfuge to evade the purposes" of the ADEA since, as noted above, it "was effectuated far in advance of the enactment of the law, eliminating any notion that it was adopted as a subterfuge for evasion." *Brennan* v. *Taft Broadcasting Co.*, 500 F.2d 212, 215 (5th Cir. 1974). Accord, *e.g.*, *United Air Lines, Inc.* v. *McMann*, *supra*, 434 U.S. at 203; *Jensen* v. *Gulf Oil Refining & Marketing Co.*, 623 F.2d 406, 413 (5th Cir. 1980).

The plaintiffs, unable or unwilling to obtain a Flight Engineer vacancy prior to age 60 pursuant to the neutral provisions of the TWA pilot seniority system (A-23), were mandatorily retired as Captains because they were no longer qualified to perform that particular job. The FAA "age 60" rule prohibits the employment of anyone as a Captain beyond that age, and all the parties agree this rule is subject to the "BFOQ" provision in the ADEA (A-7 to A-8).[34] That was found by the district court to comply with the ADEA because "any denial of Flight Engineer status to pilots resulted from the neutral application of this bona fide seniority system and not by discriminatory treatment on the basis of age. Their forced retirement at age sixty was due solely to their reaching that age while in the pilot status." (A-60).[35]

Around sixty former TWA Captains are now serving or have served as Flight Engineers beyond age 60 (J.A. 189, ¶ 18). In each case, it is undisputed they have been filling Flight Engi-

---

34 Section 4(f)(1) permits retirement prior to age 70 "where age is a bona fide occupational qualification ['BFOQ'] reasonably necessary to the normal operation of the particular business" (29 U.S.C. § 623(f)(1)).

The House Report accompanying the 1978 amendments recognizes that employers have a right to have mandatory retirement at an age that is a BFOQ. The Report states "it is not intended that the [amendments] prohibit mandatory retirement or other employment practices where age is a bona fide occupational qualification . . . [under Section] 4(f)(1)." H.R. Rep. No. 95-527, 95th Cong., 1st Sess. 12 (1977). See also comments by Senator Javits, *supra*, p. 19, n.21, and his comments at 123 Cong. Rec. 34,297 (1977) ("At the administration's request, clarifying language was approved which permits the establishment of a designated retirement age less than age 70 where the employer can show that age is a bona fide indicator of job performance"). *Cf. Johnson* v. *Mayor of Baltimore*, *supra*, 34 FEP Cases at 857, where the Fourth Circuit recently upheld under the ADEA the mandatory retirement of municipal firefighters at age 55 because "Congress has deemed age to be a *bona fide* occupational qualification for federal firefighters . . ."

35 Of course, under Section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), the seniority system cannot "require or permit" involuntary retirement because of age. However, as the district court noted above, it is not the seniority system which results in a pilot retiring at age 60 but the FAA "age 60" rule which is subject to the ADEA's "BFOQ" exception.

neer vacancies to which they were entitled by virtue of their positions on the pilot seniority list.[36]

3. *The Plaintiffs Cannot Show That TWA's Policy Was a Pretext*

Clearly, TWA has " 'articulate[d] some legitimate, nondiscriminatory reason for the employee's rejection.' " *Burdine*, *supra*, 450 U.S. at 253. The majority below therefore erred when it failed to take the third step in the *Burdine* standard and examine whether TWA's actions were "pretextual." (A-31 n.18).

Had the majority taken that third step, it would have found there was no such pretext. Since TWA has around sixty former Captains who have served or are now serving beyond age 60 as Flight Engineers and another ninety "career" Flight Engineers similarly situated (J.A. 189, ¶ 18), it is simply impossible to show that TWA's policy is "a pretext" for age discrimination. TWA is the only trunk airline which has voluntarily permitted former Captains to downbid to Flight Engineer and serve in that capacity beyond age 60.[37] This has been done in accord-

---

36 The majority's decision below criticizes not only TWA's basic "age 60" policy (A-9 to A-10), but it criticizes (A-11 to A-12) certain refinements made by TWA to treat everyone equally, *supra*, pp. 10-11. However, this Court has recognized in *California Brewers Ass'n* v. *Bryant*, *supra*, 444 U.S. at 607, that "[i]n order for any seniority system to operate at all, it has to contain ancillary rules that accomplish certain necessary functions, but which may not themselves be directly related to length of employment."

Moreover, it is obviously "legitimate" and "nondiscriminatory," *Burdine*, *supra*, 450 U.S. at 254, for TWA to require a threshold level of competence as a Flight Engineer by having written proof of successful completion of the FAA written exam at the time of training. See also *EEOC* v. *Frontier Airlines, Inc.*, *supra*, 673 F.2d at 1159, where, under the ADEA, a person's failure to meet pilot medical requirements at the time of training "presented sufficient evidence of nondiscriminatory reasons for preventing [him] from starting the [training] class." Of course, under Section 601(b) of the Federal Aviation Act, 49 U.S.C. § 1421 (b), TWA has the statutory duty "to perform [its] services with the highest possible degree of safety . . ."

37 See J.A. 487-88; 492, No. 12; see also J.A. 561, 562. Those carriers which have subsequently permitted former Captains to serve as Flight Engineers beyond 60 reacted only after lawsuits were brought to compel them to adopt such a policy.

ance with the neutral provisions of the Working Agreement, and it required no change in the language of the Working Agreement.

83% of those Captains who wanted to serve as Flight Engineers have done so, *supra*, p. 21. By any statistical criteria, this is compelling evidence of the fairness of TWA's "age 60" policy. Indeed, it strains credulity for anyone to claim there was intentional discrimination here when there has been an 83% success rate for Captains and a 100% success rate for "career" Flight Engineers. This record is unequalled amongst the trunk airlines, and it was accomplished despite ALPA's law suit against TWA for having adopted such a policy. As the dissent noted, TWA is really worthy "of receiving commendation for what it has done" (A-36).

The plaintiffs have therefore failed on every count to satisfy *McDonnell Douglas* and *Burdine*. They could not establish a prima facie case, and even if they could, TWA has offered a "legitimate, nondiscriminatory" reason which plaintiffs are unable to show was pretextual. Accordingly, this Court should remand to the lower court with instructions to dismiss the complaint.

II. THE TEST FOR "WILLFULNESS" UNDER THE ADEA SHOULD REQUIRE PROOF OF SPECIFIC INTENT TO DISCRIMINATE

A. The Decision Below

The majority below not only erred in finding TWA liable under the ADEA, but it also erred in its rulings on damages even assuming such liability. Without benefit of trial and on the basis of nothing more than "an inference of discriminatory motive" (A-24), the majority held that TWA was guilty of a "willful" violation of the ADEA entitling plaintiffs to liquidated damages.

Under the ADEA, liquidated damages are "double damages . . . equal to the pecuniary losses sustained by way of lost wages" (A-33). The majority stated that in order to recover

such damages "in a case based on discriminatory treatment," "plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." (A-33).

Under the majority's view, " '[i]n a discriminatory treatment case . . . an employer's action, if taken *because of* an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reason.' " (A-33 to A-34) (emphasis in original). It follows from this statement that any time there is a finding of disparate treatment (even when it is admittedly inferred) (A-24), liquidated damages *automatically* result.[38] That is inconsistent with the language of the ADEA, its legislative history, other statutes and basic principles of tort and general damages.

B. Liquidated Damages and the Two-Tiered Level of Liability

In Section 7(b) of the ADEA, Congress mandated "[t]hat liquidated damages shall be payable *only* in cases of *willful* violations of *this Act*." (29 U.S.C. § 626(b)). Congress has thereby clearly established a two-tiered level of liability under the ADEA, one non-willful and one willful.[39] The courts which

---

38 After quoting the test cited above, the majority's decision simply states: "Applying these principles, TWA was *clearly aware* of the 1978 ADEA amendments; indeed, it was required to post them, 29 U.S.C. § 627." (A-34). No finding was made that TWA knowingly acted with specific intent to discriminate, and indeed, it is "unrebutted" that 83% of those Captains seeking to serve as Flight Engineers beyond age 60 have succeeded in that regard (A-61 n.8).

39 See also *Lorillard* v. *Pons*, *supra*, 434 U.S. at 581, where the Court stated that "Congress altered the circumstances under which such awards [for liquidated damages] would be available in ADEA actions by mandating that such damages be awarded *only where* the violation of the ADEA is willful." See also *Syvock* v. *Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 155 (7th Cir. 1981) ("[T]he legislative history of the ADEA suggests that the Congressional framers thought that non-willful discrimination directed towards an individual was quite possible").

have best recognized the distinction between these two tiers are those which have required proof of specific intent to do an act forbidden by the ADEA. That is the test presently followed by the First and Seventh Circuits.

In the First Circuit, an " 'act is done "willfully" if done voluntarily and intentionally, *and with the specific intent to do something the law forbids*; that is to say, with bad purpose either to disobey or disregard the law.' " *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1020 n.27 (1st Cir. 1979). Similarly, in the Seventh Circuit, "a finding of willfulness should lie *only if* there is some showing as to the defendant's *knowledge of the illegality* of his actions." *Syvock* v. *Milwaukee Boiler Mfg. Co.*, *supra*, 665 F.2d at 155.[40] Accord, *e.g.*, *Koyen* v. *Consolidated Edison Co.*, 560 F. Supp. 1161, 1165 (S.D.N.Y. 1983) (Weinfeld, J.) ("subscrib[ing] to the view that to entitle plaintiff to receive liquidated damages he must establish that the defendant acted with *knowledge of the illegality* of his action"); *Whittlesey* v. *Union Carbide Corp.*, 567 F. Supp. 1320, 1330 (S.D.N.Y. 1983) (following *Koyen*).

C. The Plain Language of the ADEA Supports Such a Test

As this Court has recognized, "willful . . . is a word of many meanings, its construction often being influenced by its context." *Spies* v. *United States*, 317 U.S. 492, 497 (1943). In this ADEA context, "Congress exhibited both a detailed knowledge of the FLSA[41] provisions and their judicial interpretation *and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation.*" *Lorillard* v. *Pons*, *supra*, 434 U.S. at 581.

---

40 The *Syvock* court reasoned that to allow liquidated damages for "willful" violations "without any showing as to the defendant's state of mind" would lead to automatic doubling in all disparate treatment cases. This result, the court continued, was without support in the ADEA's language or legislative history (*id.* at 154-55).

The *Syvock* language was most recently cited with approval by the Seventh Circuit in *Orzel* v. *City of Wauwautosa Fire Dep't*, 697 F.2d 743, 757-58 (7th Cir.), *cert. denied*, ___ U.S. ___, 104 S. Ct. 484 (1983).

41 The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*

The liquidated damages provision for "willfulness" presents precisely one such point of departure. The remedial provision of the FLSA incorporated into the ADEA is 29 U.S.C. § 216(b). That FLSA provision "[b]y its terms . . . requires that liquidated damages be awarded *as a matter of right* for violations of the FLSA." *Lorillard*, *supra*, 434 U.S. at 581 n.8. To avoid such automatic doubling for an ADEA violation, Congress expressly chose language in Section 7(b) indicating that liquidated damages were to be the exception and not the rule: "*Provided*, that liquidated damages shall be payable *only* in cases of *willful* violations of this Act." (29 U.S.C. § 626(b)).

Had Congress intended to be so generous in permitting double damages, it could have easily done so. Its proviso, however, is a clear indicator that it regarded the FLSA's automatic doubling as "undesirable or inappropriate for incorporation." *Lorillard*, *supra*, 434 U.S. at 581.[42]

D. The Legislative History Supports Requiring Specific Intent to Discriminate

While some courts are of the mistaken view that there is no legislative history defining "willful" under the ADEA,[43] there

---

42 An example of how far the lower courts have strayed from the intent of Congress to have a two-tiered level of liability under the ADEA is evident from *Crosland* v. *Charlotte Eye, Ear and Throat Hosp.*, 686 F.2d 208, 217 (4th Cir. 1982), which holds that " 'an employer acts willfully . . . if he knows or has reason to know, that his conduct is *governed by* [the ADEA].' "

Given the prominence of the ADEA, such a test would read the statutory language "*only* in cases of *willful* violations" out of the ADEA. That would be contrary to the cardinal principle that a statute " 'ought . . . to be so construed that . . . no clause, sentence, *or word* shall be superfluous, void, or insignificant.' " *United States* v. *Campos-Serrano*, 404 U.S. 293, 301 n.14 (1971). See also, *e.g.*, *Aero Mayflower Transit Co.* v. *ICC*, 535 F.2d 997, 1001 (7th Cir. 1976) ("If Congress intended that every civil violation . . . would activate Commission powers of revocation and suspension, regardless of fault, it would not have drafted 'willful' into" Section 212(a) of the Interstate Commerce Act, 49 U.S.C. § 312(a)).

43 See, *e.g.*, *Kelly* v. *American Standard, Inc.*, 640 F.2d 974, 979 (9th Cir. 1981); *Wehr* v. *Burroughs Corp.*, 619 F.2d 276, 282 (3d Cir. 1980). In this regard, the brief *amicus curiae* of United Air Lines, Inc. is equally wrong (p. 5).

actually are strong indications in the legislative history that Congress intended the liquidated damages provision to serve as a substitute for punitive damages. The standard TWA proposes, specific intent to discriminate, is entirely consistent with and best effectuates this legislative intent.

The original bill proposed by the Administration made it a crime to willfully commit any practice made unlawful by the bill. S. 830, H.R. 3651, 90th Cong. 1st Sess., 113 Cong. Rec. 2199 (1967) (remarks of Senator Javits). However, Senator Javits found "certain serious defects" in the Administration bill (*id.*) and introduced an alternative bill, S. 788, 90th Cong., 1st Sess. (1967). In place of the criminal provision, Senator Javits proposed language that formed the genesis of Section 7(b) of the ADEA. His proposed Amendment No. 125 provided that "[a]ny person who violates" the statute shall be liable for unpaid compensation, "and in the case of willful violation of this Act, in an additional equal amount as liquidated damages." 113 Cong. Rec. 7077 (1967). This language, with only minor modification, was enacted into the ADEA. In explaining his proposal, Senator Javits made it clear that liquidated damages were incorporated to deter and punish violators:

> "[T]he criminal penalty in cases of willful violation has been eliminated and a double damage liability substituted. *This will furnish an effective deterrent to willful violations* and at the same time avoid the difficult problems of proof which would arise under a criminal provision." (*Id.* at 7076).

From this, "[i]t is quite apparent that Senator Javits . . . held the view that liquidated damages could effectively supply the deterrent and punitive damages which both criminal penalties and punitive damages normally serve." *Dean* v. *American Security Insurance Co.*, 559 F.2d 1036, 1040 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). See also *Rogers* v. *Exxon Research & Engineering Co.*, 550 F.2d 834, 840 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) ("If the employer's conduct

has been such as to merit punitive treatment, then he is to be penalized by doubling the award").[44]

Given the Congressional interest in using the civil remedy of liquidated damages to deter and punish violations, guidance on the meaning of "willful" can properly be drawn from general tort standards for punitive damages.[45] Such an analysis supports the conclusion that specific intent to violate the ADEA should be the necessary test.[46]

---

44 See also, *e.g.*, *Balmer* v. *Community House Ass'n*, 572 F. Supp. 1048, 1049 (E.D. Mich. 1983) (ADEA liquidated damages "overlap" with exemplary or punitive damages recoverable under state law); *Gifford* v. *B.D. Diagnostics*, 458 F. Supp. 462, 464 (N.D. Ohio 1978) ("liquidated damages are to take the place of punitive damages under the ADEA"); Smith & Leggette, *Recent Issues in Litigation Under the Age Discrimination in Employment Act*, 41 Ohio St. L. J. 349, 369 (1980) ("Congress apparently meant the liquidated damages provision to serve as a substitute for punitive damages").

45 Generally, to recover punitive or exemplary damages in tort, there must be "certain aggravating circumstances, such as malice, wantonness, *willfulness*, oppression, gross negligence, or fraud . . ." 25 C.J.S. *Damages* § 123(1) (1966), at p. 1133. Such damages are given "as an enhancement of compensatory damages because of the . . . character of the acts complained of." 22 Am. Jur. 2d *Damages* § 236 (1965), at p. 322. See, *e.g.*, *Lake Shore & Mich. S. Ry.* v. *Prentice*, 147 U.S. 101, 107 (1893) ("guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages"); *Lee* v. *Southern Home Sites Corp.*, 429 F.2d 290, 294 (5th Cir. 1970) ("punitive damages . . . may be imposed if a defendant has acted *wilfully* [sic] and in gross disregard for the rights of the complaining party").

46 In presenting the ADEA, Senator Javits also stated:

> "We now have the enforcement plan which I think is best adapted to carry out this age-discrimination-in-employment ban with the least overanxiety or difficulty on the part of American business . . . " 113 Cong. Rec. 31,254 (1967).

His reference to "least overanxiety or difficulty" is a further indication that Congress did not contemplate automatic double damages or anything approaching such an easy standard of liability. See also, *e.g.*, *Hays* v. *Republic Steel Corp.*, 531 F.2d 1307, 1311 (5th Cir. 1976) ("The Senator's reference . . . could hardly have been made if there were an absolute imposition of liquidated damages").

A specific intent test also harmonizes with this Court's requirement that discriminatory purpose "implies more than intent as volition or intent as awareness of consequences." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979). Instead, it "implies that the decisionmaker," *e.g.*, an employer, "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (*Id.*) See also, *e.g.*, *Guardians Association* v. *Civil Service Commission*, ___ U.S. ___, 103 S. Ct. 3221, 3230 n.20 (1983) (White, J.) ("It is not uncommon in the law for the extent of a defendant's liability to turn on the extent of his knowledge or culpability").

The current confusion among the Circuits, and the resulting permissive standards in some for double damages, results from a wooden adherence to the traditional definition of "willful" in the civil context. There, it "often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental," *United States* v. *Murdock*, 290 U.S. 389, 394 (1933). Some Circuits—such as the Third, Sixth and Ninth—have applied this definition literally to the ADEA context, resulting in standards similar to those followed by the court below.[47]

Adherence to an "intentional, knowing or voluntary" definition therefore results in equating a finding of disparate

47 See, *e.g.*, *Blackwell* v. *Sun Electric Corp.*, 696 F.2d 1176, 1184 (6th Cir. 1983) (to show willfulness, an ADEA plaintiff must simply "show that the employer's actions were voluntary and intentional"); *Kelly* v. *American Standard, Inc.*, *supra*, 640 F.2d at 980 (a "knowing and voluntary violation" suffices for liquidated damages); *Wehr* v. *Burroughs Corp.*, *supra*, 619 F.2d at 283 (requiring only proof "that the company discharged the employee because of age and that the discharge was voluntary and not accidental, mistaken, or inadvertent").

In contrast, the *Syvock* court specifically noted how its "focus on the defendant's state of mind at the time the alleged discriminatory acts occurred" differed from the misnomered "deliberate, intentional, and knowing" test adopted by the Circuits above. See 665 F.2d at 155. As noted previously, the *Syvock* court adopted its standard after examining the "legislative history of the ADEA" and concluding "that the Congressional framers thought that non-willful discrimination directed towards an individual was quite possible." (*Id.*)

treatment with a finding of willfulness. Where a jury finds in a disparate treatment case that a decision was made because of age, it "necessarily conclude[s] that [the employer's] action was intentional." *Goodman* v. *Heublein, Inc.*, 645 F.2d 127, 131 n.6 (2d Cir. 1981).[48] However, in the search for willfulness, a finding of disparate treatment should only begin the inquiry. Requiring specific intent to do an act forbidden by the ADEA is more faithful to the statute's plain language, its legislative history and the better reasoned opinions below. It should be adopted here.[49]

48 See also, *e.g.*, *Duffy* v. *Wheeling Pittsburgh Steel Corp.*, 33 FEP Cases 730, 736 n.4 (E.D. Pa. 1983) ("a violation is willful in any discriminatory treatment case").

49 If the specific intent test is not adopted, this Court should consider adopting a "good faith" standard. This was originally applied to ADEA cases in *Hays* v. *Republic Steel Corp.*, *supra*, 531 F.2d at 1311, and it permits a trial court to deny liquidated damages, in whole or in part, upon a "finding that the employer acted *in good faith* and had reasonable grounds for believing that its actions were not violative of the ADEA." *Elliot* v. *Group Medical & Surgical Serv.*, 714 F.2d 556, 558 n.2 (5th Cir. 1983). See also, *e.g.*, *Hedrick* v. *Hercules, Inc.*, 658 F.2d 1088, 1096 (5th Cir. 1981) (allowing "discretion to deny or reduce liquidated damages" upon a showing by the employer that it acted in a "good faith effort to comply with the ADEA through the establishment of guidelines" to be followed in implementing a reorganization plan).

In any event, it should be noted the Government is not entitled as a matter of law to recover liquidated damages here. As enacted in 1967, Section 7(b) of the ADEA specifically incorporated several FLSA sections, including the liquidated damages provision in 29 U.S.C. § 216(c). However, Section 7(b) made no provision for incorporating any *future* amendments to the FLSA, and the Government was not entitled to recover liquidated damages under the FLSA until an amendment in 1974. Pub. L. No. 93-259, § 26, 88 Stat. 73. It is a "well-settled canon" that where a statute like the ADEA " 'adopts the particular provisions of another [statute] by a specific and descriptive reference, . . . [s]uch adoption takes the [latter] statute *as it exists at the time of adoption*,' " *Hassett* v. *Welch*, 303 U.S. 303, 314 (1938). Therefore, the ADEA " 'does not include subsequent additions or modifications of the [FLSA] . . . unless it does so by express intent.' " (*Id.*)

When Congress amended the ADEA in 1978, it manifested no such "express intent" and could easily have done so. Accordingly, *Hassett* dictates that the powers granted to the Government in 1974 to recover liquidated damages under the FLSA were not incorporated in the ADEA.

III. ASSUMING THERE IS A VIOLATION OF THE ADEA HERE, A CO-DEFENDANT UNION SHOULD BE JOINTLY LIABLE WITH THE EMPLOYER FOR MONETARY RELIEF

A. The Holding of the Court Below

In a dramatic about-face, the majority first held ALPA jointly liable with TWA for "back pay, an equitable remedy" (A-34), and then, after denying petitions for rehearing, it issued a terse "Errata Sheet" *deleting* all references to ALPA's liability for monetary relief (A-37 to A-39). In its "corrected" decision, the Second Circuit holds that "the ADEA . . . does not permit actions to recover monetary damages, including back pay, against a labor organization." (A-38). It thus becomes the first Circuit Court to hold employers *solely* liable for monetary relief under the ADEA even where, as here, a co-defendant labor organization is found also to have violated the statute.[50]

The changed holding below receives no support in the language and purpose of the ADEA to provide employee

50 Only two reported district court decisions have squarely addressed the issue, with different results. In *EEOC* v. *ALPA*, 499 F. Supp. 1003, 1009 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981), the court relied on the language of 29 U.S.C. § 626(b) and "analogous case law under Title VII" in reaching its holding that a "union as well as employer can be held liable for backpay awards." A contrary result obtained in *Newman* v. *Northwest Airlines, Inc.*, 28 FEP Cases 1488, 1491 (N.D. Ill. 1982).

The majority's "Errata Sheet" added as authority for its holding a citation to *Brennan* v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057, 1059 n.5 (S.D.N.Y. 1975). That case, however, dealt not with the ADEA but with the Equal Pay Act, 29 U.S.C. § 206(d), and simply held that an employer could not maintain a private cause of action against a labor organization for contribution or indemnity.

The *Brennan* holding was subsequently adopted by this Court in *Northwest Airlines, Inc.* v. *TWU*, 451 U.S. 77 (1981), but the question of contribution continues to be inapposite to whether a co-defendant union can be held accountable for monetary liability under the ADEA. See, *e.g.*, *id.* at 88-89 n.20 ("we need not and do not decide the question whether employees have an implied right of action for back pay against their unions for violations of the Equal Pay Act").

redress from both labor organizations and employers by giving courts broad power "to grant such legal or equitable relief as may be appropriate" (29 U.S.C. § 626(b)). The decision is also inconsistent with "[t]he governing principle" of national labor policy "to apportion liability between the employer and the union according to the damage caused by the fault of each." *Vaca* v. *Sipes*, 386 U.S. 171, 197 (1967). Finally, without any support in the legislative history, the holding below attributes to Congress an intent to shield unions from monetary liability for the natural consequences of their discriminatory acts. It thereby frustrates the paramount "make whole" remedial concept of employment discrimination law.

B. The Holding Urged by Petitioner Is Supported by the Clear Purposes of the ADEA

The overriding purposes of the ADEA are "to promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age discrimination in employment" (29 U.S.C. § 621(b)). To effectuate these purposes, the ADEA contains a number of specific provisions expressly prohibiting age-based conduct by unions.[51]

The enforcement provision of the ADEA, Section 7(b), 29 U.S.C. § 626(b), contains no language absolving labor organizations from monetary liability for this prohibited conduct. Rather, that section broadly provides *that a court* "shall have jurisdiction to grant *such legal* or equitable relief as may be appropriate to effectuate the purposes *of this Act*, including . . . enforcing the liability for amounts deemed to be unpaid

51 For example, Section 4(c) of the ADEA provides that "[i]t shall be unlawful" for a labor organization "to discriminate against . . . any individual because of his age" or "to cause or attempt to cause an employer to discriminate against an individual in violation of this section." (29 U.S.C. § 623(c)). Labor organizations are further prohibited from retaliating against employees or applicants who exercise their ADEA rights (Section 4(d), 29 U.S.C. § 623(d)), and from making age-based distinctions in advertising or referrals for employment. Section 4(e), 29 U.S.C. § 623(e). In addition, labor organizations are required under Section 8, 29 U.S.C. § 627, to post ADEA notices advising individuals of their rights.

minimum wages or unpaid overtime compensation . . ." Since the purposes of the statute include prohibitions on age-based actions by labor organizations, it is only logical that Congress intended Section 7(b) to include union monetary exposure in appropriate cases. As noted in *EEOC* v. *ALPA*, *supra*, 489 F. Supp. at 1009:

> "It would not effectuate the purposes of the ADEA to allow unions to violate the Act without having to be concerned with being held liable for any resulting monetary damages."[52]

The reference in the ADEA to "unpaid minimum wages or unpaid overtime compensation" relates to language in the FLSA which has been specifically incorporated into Section 7(b) of the ADEA. It was this language which convinced the court in *Neuman*, *supra*, 28 FEP Cases at 1491, that monetary damages from a union were not available under the ADEA. However, such selectivity in the FLSA should not be applied woodenly to bar monetary recovery against a union when Section 7(b) expressly "grant[s] such legal or equitable relief as may be appropriate to effectuate the purposes of *this* Act," not the FLSA.

In this regard, it must be recognized that the purposes of the FLSA differ substantially from those of the ADEA. As the court said in *Usery* v. *Pilgrim Equipment Co.*, 527 F.2d 1308, 1310 (5th Cir.), *cert. denied*, 429 U.S. 826 (1976):

> "The purpose of the FLSA is to 'eliminate low wages and long hours' and 'free commerce from the interferences arising from production of goods under conditions that were detrimental to the health and well-being of workers.' "

52 See A-31 to A-33 for a discussion of what the majority viewed as the union's culpability here. In the face of such findings, the "Errata Sheet" may have removed monetary liability from ALPA, but it did not alter the majority's holding that "[w]hen a union becomes a party to a discriminatory provision in a collective bargaining agreement binding the employer to an unlawful practice, the union's conduct in aiding and abetting the employer to discriminate against employees renders it independently liable for violation of the ADEA, 29 U.S.C. § 623(c)(3)." (A-32).

Such purposes obviously limit the applicability of the FLSA to unions. It explains why it is only logical for some of the remedies under the FLSA to differ from those of the ADEA.[53]

In addition, the legislative history of the bill that became the ADEA, S. 830, *supra*, p. 34, clearly indicates that Congress deemed the statute equally applicable to employers and unions. For example, Senator Yarborough, in introducing the legislation, specifically noted that "[t]he bill's prohibitions against arbitrary employment practices harmful to older persons are directed against employers, *labor organizations*, and employment agencies." 113 Cong. Rec. 2467 (1967). See also the remarks of Representative Perkins (the bill "makes it illegal for . . . *a labor union* . . . to discriminate . . . because of his age") (*id.* at 34,740); and the remarks of Representative Kelly ("[t]he prohibitions in the bill would apply to employers, employment agencies, and *labor organizations*") (*id.* at 34,743).

Nowhere in the ADEA's legislative history is there any indication that Congress intended these clear prohibitions to be without the "teeth" of potential monetary exposure.[54]

C. Holding Unions Responsible for Monetary Liability Under the ADEA Would Be Consistent With Other National Labor Laws

Analogous support for holding unions liable can be drawn from case law under Title VII where unions as well as employ-

53 *Cf. Usery* v. *Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977), where the scope of the Equal Pay Act, which is "housed in" the FLSA, was viewed as different from the FLSA because the Equal Pay Act "is a separate law, enacted at a different time, and aimed at a separate problem . . ." The same should be true of the ADEA here.

54 Accord, *EEOC* v. *ALPA*, *supra*, 489 F. Supp. at 1009 n.5 ("ALPA has cited the court to nothing in the legislative history of the ADEA suggesting unions should be immune from damages liability, and the court also has found no such indication in the Act's legislative history . . .").

ers can be held liable for monetary relief.[55] These two statutes, sharing as they do "important similarities . . . in their aims . . . and in their substantive prohibitions," *Lorillard* v. *Pons*, *supra*, 434 U.S. at 584, "should be interpreted" here "*pari passu*." *Northcross* v. *Memphis Board of Education*, 412 U.S. 427, 428 (1973).

In addition, holding unions liable for monetary relief under the ADEA would be consistent with other important national labor laws. It is well-established, for example, that under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, an employee who proves that the employer violated a labor agreement and that the union breached its duty of fair representation is entitled to recover damages from both the union and the employer "according to the damage caused by the fault of each." *Vaca* v. *Sipes*, *supra*, 386 U.S. at 197.[56] This is similarly true under the RLA, where each party can be held to bear the damages attributable to its fault. See, *e.g.*, *Czosek* v. *O'Mara*, 397 U.S. 25, 29 (1970) ("judgment against [the union] can . . . be had . . . for those damages that flowed from [its] own conduct").[57]

---

55 *See, e.g.*, *Sears* v. *Atchison, T. & S.F. Ry.*, 645 F.2d 1365, 1374-77 (10th Cir. 1981), *cert. denied*, 456 U.S. 964 (1982); *Donnell* v. *General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978); *Russell* v. *American Tobacco Co.*, 528 F.2d 357, 366 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

56 This principle was recently reaffirmed by this Court in *Bowen* v. *United States Postal Serv.*, ____ U.S. ____, 103 S. Ct. 588 (1983), which held that where a union refuses to go to arbitration and is found to have breached its duty of fair representation, the union is liable for monetary damages that accrue after a hypothetical date on which an arbitrator would have issued an award.

57 *See also Hodgson* v. *Sagner, Inc.*, 326 F. Supp. 371, 373-74 (D. Md. 1971), *aff'd sub nom. Hodgson* v. *Baltimore Regional Joint Bd.*, 462 F.2d 180 (4th Cir. 1972), where, as here, the union was a co-defendant with the employer, and both were held liable for money damages under the Equal Pay Act, 29 U.S.C. § 206(d).

Given the substantial role that unions play in many activities subject to challenge under the ADEA, no reason exists why the *Vaca* principle of apportionment should not obtain under the ADEA. Apart from the circumstances here, myriad situations exist wherein employers and unions could be jointly challenged under the ADEA.[58] This is particularly true where the dispute centers on provisions in a collective bargaining agreement (by definition a joint employer/union endeavor). Without the spectre of monetary exposure, the "interest in deterring future [unlawful acts] by the union," *Bowen*, *supra*, 103 S. Ct. at 597 n.16, is meaningless.[59]

D. Holding Unions Accountable Is Consonant With the "Make Whole" Remedial Concept of Employment Discrimination Law

The ADEA shares with Title VII the purpose "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975).[60] This is "shown by the very fact that

---

58 For example, a district court recently held that an EEOC interpretation allowing age restrictions on apprenticeship programs was unlawful. *Quinn* v. *New York State Elec. & Gas Corp.*, 569 F. Supp. 655 (N.D.N.Y. 1983). If adopted elsewhere, all age-restrictive apprenticeship programs (so often the product of union and employer negotiations) are fair game for attack. Yet, under the decision below, only the employer faces monetary liability.

59 Moreover, if a union is held liable for back pay, such a back pay award should include liquidated damages which are, after all, "equal to the pecuniary losses sustained by way of lost wages." (A-33). Once the principle of monetary liability is established against a union, it follows *a fortiori* that such monetary liability includes liquidated damages provided that a union is guilty of a "willful" violation of the ADEA. Accordingly, if this Court decides that a union can be held liable for monetary relief, it should declare that such monetary relief can include liquidated damages.

60 *See, e.g.*, *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1243 & 1238 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) ("The make-whole relief objective is common to both Title VII and ADEA" and "should be the touchstone for the district courts in fashioning both legal and equitable remedies in age discrimination cases").

Congress took care to arm the courts" (*id.*) with broad power "to grant such legal or equitable relief as may be appropriate" (29 U.S.C. § 626(b)). As with Title VII, back pay has an "obvious connection" (422 U.S. at 417) with the mandate to eliminate age discrimination, a mandate Congress must have intended for employers and unions alike. As this Court stated in *Albermarle*:

> "It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices' . . ." (*id.* at 417-18).[44]

Logic alone dictates that if both parties are liable, they should be held accountable to the degree they are each culpable. That is certainly not the case now. The employer defendant is stuck with *total* monetary liability even though it is conceded by everyone that the statutory prohibitions in the ADEA apply just as equally to the union defendant.

Moreover, under the decision below, a plaintiff is left totally without an adequate remedy when a union *alone* has been found to have violated the ADEA. In a very real sense, the "make whole" cornerstone of employment discrimination law is thereby stripped of all meaning. Assuming there is liability here, this Court should eliminate the obvious inequity and anomaly which result from the holding below.

---

44 See also *Headgate v. Segner, Inc.*, supra, where, in rejecting a union's contention that it should not be jointly liable for monetary relief under the Equal Pay Act, the court stated:

> "If [the union's] position were correct, a union which had caused an employer to illegally withhold wages from its employees would be subject to no more than future restraint. Its past violation of the law would go uncorrected and unpunished; it could merely be prevented from breaking the law in the future. There is no apparent reason why a union which violates Section 206(d) should be treated any differently from an employer violator." (526 F. Supp. at 373).

CONCLUSION

Because TWA's policy was in compliance with the ADEA, the judgment of the United States Court of Appeals for the Second Circuit should be reversed. However, in the event that this Court finds liability under the ADEA, it should remand to the Second Circuit for instructions to the district court (i) to determine whether defendants' actions were a "willful" violation of the ADEA consistent with the definition adopted by this Court and (ii) for any further proceedings to determine the extent to which the co-defendant union should be liable for money damages under the ADEA.

Respectfully submitted,

HENRY J. OECHLER, JR.
30 Rockefeller Plaza
New York, N.Y. 10112
(212) 541-5800
Counsel of Record for
Trans World Airlines, Inc.

DONALD I STRAUBER
PETER N. HILLMAN
CHADBOURNE, PARKE, WHITESIDE
& WOLFF
Of Counsel

May 17, 1984

AMICUS CURIAE

BRIEF

MOTION FILED
MAY 17 1984

Nos. 83-997, 83-1225

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.
HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,
v.
HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION TO SUBMIT BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF REVERSAL

ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL
THOMAS R. BAGBY *
McGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council
* Counsel of Record

BEST AVAILABLE COPY

May 17, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

35pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE	v
INTEREST OF THE AMICUS CURIAE	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. THE COURT OF APPEALS ERRED IN FINDING A WILLFUL VIOLATION OF THE ADEA AND IN IMPOSING LIQUIDATED DAMAGES IN THE ABSENCE OF A SPECIFIC INTENT TO VIOLATE THE ACT	8
A. A "Specific Intent" Standard Is Most Consistent With The Statutory Scheme And The Intent Of Congress	8
B. A Standard That Declines To Require "Specific Intent" Ignores Congressional Intent To Limit Liquidated Damages To Conscious Violations	15
II. A UNION FOUND TO HAVE VIOLATED THE ACT SHOULD BE HELD ACCOUNTABLE FOR MONETARY DAMAGES	22
CONCLUSION	26

TABLE OF AUTHORITIES

Cases: Page

Allen v. Amalgamated Transit Union Local 788, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977) 24
Blackwell v. Sun Elec. Corp., 696 F.2d 1176 (6th Cir. 1983) 17
Bowen v. U.S. Postal Service, 103 S.Ct. 588 (1983) 25
Cowen v. Standard Brands, Inc., 572 F. Supp. 1376 (N.D. Ala. 1983) 19
Crosland v. Charlotte Eye, Ear and Throat Hosp., 686 F.2d 208 (4th Cir. 1982) 17
Dean v. American Sec. Ins. Co., 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978) 11
Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978) 24
EEOC v. Air Line Pilots Ass'n, 489 F. Supp. 1068 (D. Minn. 1980), *reversed on other grounds*, 661 F.2d 90 (8th Cir. 1981) 24, 26
Frank Irey, Inc. v. OSHRC, 519 F.2d 1200 (3d Cir. 1974), *aff'd in banc*, 519 F.2d 1215 (1975), *aff'd on other grounds sub nom. Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977) 16
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) vii
Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978) vii
Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) 20
Goodman v. Heublein, Inc., 645 F.2d 127 (2d Cir. 1981) 19
Hodgson v. Sagner, Inc., 326 F. Supp. 371 (D. Md. 1971), *aff'd sub nom. Hodgson v. Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972) 25
Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) vii
Kelly v. American Standard, Inc., 640 F.2d 974 (9th Cir. 1981) 18
Kogen v. Consolidated Edison Co., 560 F. Supp. 1161 (S.D.N.Y. 1983) 14

TABLE OF AUTHORITIES—Continued

Page

Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) 7, 12, 14, 20
Lorillard v. Pons, 434 U.S. 573 (1978) vii, 10
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 5
Neuman v. Northwest Airlines, 28 FEP Cases 1488 (N.D. Ill. 1982) 26
Northwest Airlines v. Transport Workers Union, 451 U.S. 77 (1981) 23
Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983) 14
Shell Oil Company v. Dartt, 434 U.S. 99 (1977) vii
Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981) 16
Spies v. United States, 317 U.S. 492 (1943) 12
Syvock v. Milwaukee Boiler Mfg. Co., Inc., 665 F.2d 149 (7th Cir. 1981) 7, 12, 14, 20
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) vii
United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) 3
Vaca v. Sipes, 386 U.S. 171 (1967) 25
Wehr v. Burroughs Corp., 619 F.2d 276 (3d Cir. 1980) 15
Whittlesey v. Union Carbide Corp., 567 F. Supp. 1320 (S.D.N.Y. 1983) 14
Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) vii

Statutes, Rules and Regulations:

Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634:
Section 4(a), 29 U.S.C. § 623(a) 9
Section 4(c), 29 U.S.C. § 623(c) 22
Section 4(d), 29 U.S.C. § 623(d) 22
Section 4(e), 29 U.S.C. § 623(e) 22

TABLE OF AUTHORITIES—Continued

	Page
Section 4(f)(1), 29 U.S.C. § 623(f)(1)	2, 4
Section 7(b), 29 U.S.C. § 626(b)	9, 10, 12, 13, 20, 23, 24, 26
Equal Pay Act of 1963, 29 U.S.C. § 206(d)	23, 25
Fair Labor Standards Act, as amended, 29 U.S.C. § 201, *et seq.*:	
29 U.S.C. § 216(b)	10
Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 651, *et seq.*	16
Portal-to-Portal Pay Act, Section 11, 29 U.S.C. § 260	10
Railway Labor Act, 45 U.S.C. § 151, *et seq.*	3, 4
Rule 42.3, Rules of the Supreme Court of the Supreme Court of the United States	VI
14 C.F.R. § 211.383(c)	2
Legislative Materials:	
113 Cong. Rec. 2199 (1967)	11
2467 (1967)	22
7076 (1967)	11
34,740 (1967)	22
34,743 (1967)	22
Other Authorities:	
A. Blumrosen, *Interpreting the ADEA: Intent or Impact*, in Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Practitioners 68 (1982)	20
Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837 (1982)	20
Smith & Leggette, *Recent Issues in Litigation Under the Age Discrimination in Employment Act*, 41 Ohio St. L. J. 349 (1980)	18

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

Nos. 83-997, 83-1325

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.
HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,
v.
HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42.3 of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") moves this Court for leave to file the accompanying brief as Amicus Curiae supporting Trans World Airlines, Inc., the petitioner in No. 83-997 and the respondent in No. 83-1325. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. The Council is governed by a board of directors which is composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. Substantially all of the Council's members, or their constituents, are subject to the provisions of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634 (the "ADEA"). As such, they have a direct interest in the issues presented for the Court's determination in this case—i.e., whether the ADEA requires an employer to accommodate employees for an age-related reason

merely because it provides accommodation for non-age-related reasons; whether specific intent to discriminate is necessary to establish a "willful" violation of the ADEA; and whether a union found jointly with an employer to have violated the ADEA can be absolved from liability for monetary damages.

3. Because of its interest in issues arising under the ADEA, the Council has participated as amicus curiae in a number of cases in this Court involving the interpretation and enforcement of the Act. *See, e.g., Lorillard v. Pons*, 434 U.S. 573 (1978); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977). In addition, EEAC has filed briefs as amicus curiae on numerous other occasions in this Court. *See, e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

4. In several cases, EEAC sought and was granted permission by this Court to file such briefs. *See, e.g., Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978); *Shell Oil Company v. Dartt*, 434 U.S. 99 (1977); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

5. Trans World Airlines, the Air Line Pilots Association and the United States have consented to the filing of this brief. Their consents have been filed with the Clerk. Efforts to obtain the consent of the counsel for the respondents Harold H. Thurston, Christopher J. Clark, and C. A. Parkhill were unsuccessful, thus necessitating this motion.

WHEREFORE, it is respectfully moved that EEAC be granted leave to file the accompanying brief amicus curiae in this case.

Respectfully submitted,

THOMAS R. BAGBY
McGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600
Counsel for the Amicus Curiae
Equal Employment
Advisory Council

May 17, 1984

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

Nos. 83-997, 83-1325

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.
HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,
v.
HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus

curiae in support of Trans World Airlines, Inc. ("TWA"), the petitioner in No. 83-997 and the respondent in No. 83-1325, contingent upon the Court's granting the accompanying motion.

INTEREST OF THE AMICUS CURIAE

The interest of the EEAC in this case is fully set forth in the accompanying motion.

STATEMENT OF THE CASE

In 1978, TWA decided to permit flight deck crew members in the status of "flight engineer"[1] to work until age seventy. Prior to this time, TWA's policy had been to require all flight crew members, including "captains" (pilots), "first officers" (co-pilots) and "flight engineers" to retire at age sixty. Federal Aviation Administration (FAA) regulations prohibit persons who have reached their sixtieth birthday from serving as pilots. 14 C.F.R. § 121.383(c). The parties do not dispute that an age below sixty is a bona fide occupational qualification ("BFOQ") under 29 U.S.C. § 623(f)(1)[2] with respect to pilots and co-pilots. No FAA regulation requires the retirement at age sixty of flight engineers.

Prior to 1978, the ADEA had been interpreted to permit the mandatory retirement of persons such as

[1] Flight engineers are present on most commercial flights and are responsible, among other things, for pre-flight inspection and in-flight monitoring of the aircraft.

[2] 29 U.S.C. § 623(f)(1) provides in relevant part as follows:

> It shall not be unlawful for an employer . . . (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . .

TWA's flight engineers before age sixty-five if the retirement was pursuant to a bona fide employee benefit plan which was not being used to circumvent the policies underlying the ADEA. *See United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977). In 1978, however, the ADEA was amended to prohibit involuntary retirement before age seventy pursuant to a bona fide employee benefit plan. As a result of the 1978 amendments to the ADEA, TWA changed its policy to prohibit the mandatory retirement of "any cockpit member who [was] in a Flight Engineer status at age 60." The result of this change in policy was to permit flight engineers reaching age sixty to continue in employment and to permit captains and first officers to downbid to the position of flight engineer and to remain in that position beyond age sixty. The downbidding of captains and first officers was governed by TWA's "Working Agreement" with the Air Line Pilots Association ("ALPA"). Most of the pilots and first officers who desired to do so were able to downbid successfully to a flight engineer position before reaching age sixty and to continue in that position after reaching age sixty.

ALPA filed suit against TWA (hereinafter the "*ALPA*" action) maintaining that the policy of allowing anyone to work in the cockpit past age sixty breached the Working Agreement and the Railway Labor Act, 45 U.S.C. § 151, *et seq.* ("RLA"). In addition, several captains who were not able to downbid to flight engineer positions were mandatorily retired at age sixty and filed suit (hereinafter the "*Thurston*" action) challenging the policy under the ADEA.[3]

[3] The Equal Employment Opportunity Commission ("EEOC") was allowed to intervene in the *Thurston* action as a plaintiff on behalf of other crew members who might be affected by TWA's policy.

Their complaint alleged that TWA's "age sixty" policy had not gone far enough to accommodate them and was unlawful under the ADEA.

The district court, in an opinion reported at 547 F. Supp. 1221 (S.D.N.Y. 1982), held in the *ALPA* action that TWA's elimination of its age sixty retirement policy for flight engineers was not a "major" dispute under the RLA. The court also held, over ALPA's objection, that an age under sixty for flight engineers was not a BFOQ within the meaning of 29 U.S.C. § 623(f)(1) of the ADEA, and that TWA had acted lawfully in employing persons over age sixty as flight engineers. Accordingly, the district court granted summary judgment to TWA in the *ALPA* action.

With regard to the *Thurston* action, the district court determined that none of the plaintiffs or EEOC claimants had demonstrated that a flight engineer vacancy existed at the time he applied for and was eligible for the job. Accordingly, the district court granted summary judgment for TWA in the *Thurston* action as well. In doing so, the court stated that:

> From these undisputed facts these plaintiffs and claimants cannot establish a *prima facie* case of discrimination solely because no job vacancy existed at the time they applied and were eligible for the job. TWA was legally obligated to remove these pilots at age sixty under the FAA regulations. TWA was not obligated, however, to offer these ex-pilots jobs which did not exist. To the extent jobs existed, TWA was justified in relying upon a seniority bidding system. 547 F. Supp. at 1229 (citation omitted).

The court of appeals, in a decision reported at 713 F.2d 940 (2d Cir. 1983), unanimously affirmed the district court decision in the *ALPA* action, holding that the elimination of the age sixty retirement policy for flight engineers did not violate the RLA.

In a divided opinion, however, the court of appeals reversed the district court decision in the *Thurston* action. Initially the court of appeals agreed with the district court that "[a]pplying the *McDonnell Douglas*[4] formula here, it is clear, as the district court held, that appellants could not establish that there were flight engineer vacancies at the time they applied to transfer." 713 F.2d at 952. Nevertheless, the court stated that "[a] plaintiff is not barred by the *McDonnell Douglas* method from making out a prima facie case of age discrimination by alternative means, such as *direct* proof that an employer discriminates on the basis of age." Id. (Emphasis in original).

The court held that TWA's policy violated the ADEA, stating that:

> In short, because TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers, the *Thurston* litigants and the EEOC must prevail on their ADEA claim. 713 F.2d at 955. (Footnote omitted).

The court also held that ALPA violated the ADEA by its role in the formulation and administration of the "age sixty" policy. 713 F.2d at 956. Despite finding ALPA liable for violations of the ADEA, the court

---

[4] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

limited the relief against ALPA to injunctive relief, holding that the ADEA does not permit awards of back pay against a union. 713 F.2d at 957.

On the issue of liquidated damages,[5] the court stated that "in a case based on discriminatory treatment, such as the present one, plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 713 F.2d at 956. Accordingly, the court ordered liquidated damages against TWA.

Judge Van Graafeiland dissented with respect to the portion of the opinion holding TWA liable in the *Thurston* action, stating that:

> Apparently, TWA is the only trunk airline that voluntarily has permitted pilots over 60 to continue working as flight engineers. Instead of receiving commendation for what it has done, TWA is held liable as a matter of law for age discrimination. 713 F.2d at 957.[6]

---

[5] See the discussion below regarding liquidated damages and the standard for an award of such damages.

[6] TWA has fully briefed the issue of whether the ADEA requires an employer to accommodate employees for an age-related reason merely because it provides accommodation for non-age-related reasons. Therefore, it is not necessary for EEAC to repeat the persuasive arguments of TWA regarding this issue, in which EEAC fully concurs. Because of page limitations and in order more fully to address the remaining issues, EEAC has limited its brief to the other two issues.

SUMMARY OF ARGUMENT

The court below erred in holding that a "willful" violation of the ADEA may be established in the absence of a specific intent to violate the Act. That Congress provided for liquidated damages under the ADEA "*only* in instances *of willful* violations" indicates that more than a mere showing that age was a *factor* in an employment decision is required before liquidated damages may be awarded. "Willfulness" under the liquidated damages provision requires more than the mere intent to do the act that gave rise to the violation—it requires a specific intent to violate the Act.

The decisions of the First and Seventh Circuits in *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), and *Sprock v. Milwaukee Boiler Mfg. Co., Inc.*, 665 F.2d 149 (7th Cir. 1981), adopting a "specific intent" standard for liquidated damages are consistent with the Congressional purpose of awarding liquidated damages only against defendants who intentionally and consciously violate the Act. The focus of these decisions on the "state of mind" of the defendant at the time of the violation is consistent with the plain language and the legislative history of the liquidated damages provision of the ADEA and should be adopted by this Court. The "specific intent" test for liquidated damages also serves to further the "two-tier" approach to "willful" and "non-willful" violations envisioned by Congress.

Decisions of the lower courts that have declined to impose a specific intent requirement for awarding liquidated damages fail to consider that a "two-tier" statutory framework was established precisely to prevent an *automatic* award of liquidated damages.

The failure of these courts to require a "specific intent" standard will result in the virtual automatic doubling of damages, in direct contravention of Congressional intent.

The decision of the court below, which declined to award monetary damages against a union found to have violated the ADEA, ignores the clear intent of Congress to end age discrimination by both employers and unions. An award of monetary damages against a union found to be in violation of the ADEA is consistent with the statutory language and purposes of the Act and will serve the important purpose of deterring union discrimination. Without the likelihood of monetary liability, there is no effective deterrent to prevent unions from engaging in unlawful discrimination.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN FINDING A WILLFUL VIOLATION OF THE ADEA AND IN IMPOSING LIQUIDATED DAMAGES IN THE ABSENCE OF A SPECIFIC INTENT TO VIOLATE THE ACT

A. A "Specific Intent" Standard Is Most Consistent With The Statutory Scheme And The Intent Of Congress

The court of appeals below erred in holding that a "willful" violation of the ADEA may be found in the absence of a specific intent to violate the ADEA. The language of the opinion below renders double damages virtually automatic. The court stated that " '[i]n a disparate treatment case . . . an employer's action, if taken *because of* an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reasons.' " 713 F.2d at 956. (Emphasis in original).

The standard adopted by the court of appeals is contrary to the intent of Congress in limiting liquidated damages to instances of "willful" violations and to the better reasoned lower court decisions. Accordingly, the statutory distinction between "willful" and "non-willful" violations will be served best by a standard requiring a specific intent to violate the Act before liquidated damages are imposed.

The ADEA prohibits discrimination in the workplace based on age. Section 4(a), 29 U.S.C. § 623(a). The ADEA is enforced in accordance with the procedures provided under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, *et seq.*, with certain notable exceptions. Pursuant to Section 7(b) of the Act, 29 U.S.C. § 626(b),[1] violations of the ADEA generally are to be treated as violations of the FLSA,

---

[1] Section 7(b) reads in relevant part as follows:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of *willful* violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. (Emphasis added).

with amounts owing as a result of a violation of the ADEA treated as "unpaid minimum wages or unpaid overtime compensation" under the FLSA. Section 7(b), 29 U.S.C. § 626(b).

In contrast to the automatic doubling of damages for violations of the FLSA, 29 U.S.C. § 216(b),* the ADEA provides that "liquidated damages shall be payable only in cases of willful violations of this chapter." 29 U.S.C. § 626(b). Thus, it is clear that Congress, by restricting liquidated damages under the ADEA to "willful" violations of the Act, intended in plain statutory language to limit the awarding of liquidated damages in ADEA cases.* In order to determine the extent of this limitation on liquidated damages under the ADEA, it is helpful to examine the legislative history surrounding the incorporation of the "willful" standard, as well as the cases that have interpreted that standard.

The legislative history of the ADEA liquidated damages provision evidences the intent of its sponsor and Congress to impose liquidated damages only where an employer acts with the specific intent to

---

*29 U.S.C. § 216(b) "[b]y its terms . . . requires that liquidated damages be awarded as a matter of right for violations of the FLSA." *Lorillard v. Pons*, 434 U.S. 575, 581 n.8 (1978). Section 11 of the Portal to Portal Pay Act, 29 U.S.C. § 260, provides that liquidated damages need not be paid if the employer shows that his act or omission was in good faith. To this limited extent, Section 11 mitigates the otherwise automatic doubling of damages under 29 U.S.C. § 216.

*In *Lorillard v. Pons*, *supra*, 434 U.S. at 581, this Court noted with regard to liquidated damages that "Congress altered the circumstances under which such awards would be available in ADEA actions by mandating that such damages be awarded only where the violation of the ADEA is willful."

violate the Act. As originally proposed, the ADEA would have incorporated criminal penalties. 113 Cong. Rec. 2199 (1967). The substitution of the "willful" standard for liquidated damages was designed to serve the same purposes of deterring and punishing violators as the criminal provision would have served. *See* 113 Cong. Rec. 7076 (remarks of Sen. Javits).

In *Dean v. American Sec. Ins. Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978), the Fifth Circuit had occasion to consider the purposes of the ADEA liquidated damages provision. In holding that punitive damages are not available under the ADEA, the court noted that:

> It is quite apparent that Senator Javits, sponsor of the original bill and the amendments thereto which appear in the final enactment, held the view that liquidated damages could effectively supply the deterrent and punitive damages which both criminal penalties and punitive damages normally serve. 559 F.2d at 1040. (Footnote omitted).

The "specific intent" standard for finding a "willful" violation most closely carries out the intent of Congress that the provision "deter" and "punish" "willful" violators of the Act. That Congress, which was aware of the automatic double damage provision of the FLSA, provided liquidated damages under the ADEA "*only* in instances of *willful* violations" indicates that more than a mere showing that age was a factor in an employment decision is required before liquidated damages may be awarded. Thus, in contrast to the result below, "willfulness" under the liquidated damages provision should require more than the mere intent to do the act that gave rise to

the violation—it should require a specific and conscious intent to violate the Act.

As this Court noted in *Spies v. United States*, 317 U.S. 492, 497 (1943), "willful, as we have said, is a word of many meanings, its construction often being influenced by its context." Thus, it is not surprising that the lower courts have reached conflicting conclusions regarding the meaning of the "willful" language in Section 7(b). Notwithstanding the varying results reached by the lower courts, it is submitted that a "specific intent" standard is most faithful to the purposes of the legislative scheme enacted by Congress and should be adopted by this Court.

In *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the First Circuit had occasion to consider the meaning of "willfully" under the liquidated damages provision of the ADEA. The court stated that:

> An act is done "willfully" if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law. 600 F.2d at 1020 n.27, quoting E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.06, at 384 (3d ed. 1977).

Consistent with the approach of the First Circuit in *Loeb v. Textron* is the decision of the Seventh Circuit in *Sysock v. Milwaukee Boiler Mfg. Co., Inc.*, 665 F.2d 149 (7th Cir. 1981). While pointing out that a finding of liability under the ADEA could be established without any showing as to the defendant's state of mind, the court correctly observed that "by allowing liquidated damages only for a 'willful' violation, 29 U.S.C. § 626(b) (1976), Congress did not intend the doubling of damages to be automatic."

665 F.2d at 154-55. The court found support for this proposition in the legislative history of the ADEA, stating that:

> In fact, the legislative history of the ADEA suggests that the Congressional framers thought that non-willful discrimination directed towards an individual was quite possible. Unlike race discrimination, age discrimination may simply arise from an *unconscious* application of stereotyped notions of ability rather than from a deliberate desire to remove older employees from the workforce. 665 F.2d at 155. (Emphasis added).

With regard to the standard for determining willfulness under the Act, the Seventh Circuit held that:

> The standard for willfulness therefore should *focus on the defendant's state of mind* at the time the allegedly discriminatory acts occurred. It must distinguish those situations in which an employer *consciously* discriminates against an employee because of age from those in which the discrimination is unconscious. The distinction is just as necessary in disparate treatment cases as it is when the plaintiff sues on a discriminatory impact theory. We think that a finding of willfulness should lie only if there is some showing as to the defendant's knowledge of the illegality of his actions. We hold that, in order to prove willfullness under 29 U.S.C. § 626(b) (1976), a plaintiff must show that the defendant's actions were knowing and voluntary and that he knew or reasonably should have known that those actions violated the ADEA. 665 F.2d at 155-56. (Emphasis added and footnotes omitted).

The approach of the Seventh Circuit in *Syvock*, focusing on the "state of mind" of the defendant, clearly maintains the "two-tier" approach to "willful" and "non-willful" violations envisioned by Congress. In this regard, the court noted that the showing that the defendant knew or reasonably should have known that its actions were inconsistent with the law:

> [M]ust clearly be greater than that necessary for the initial finding of ADEA liability. The showing must be sufficient to indicate that the defendant's discrimination was not unconscious. *In a disparate treatment case, a finding of willfulness will generally require some direct evidence of discriminatory intent toward the plaintiff or a showing that, at the time of the alleged discriminatory action, the employer was motivated to discriminate or engaged in a pattern of discriminating against older employees.* 665 F.2d at 156 n.10 (emphasis added).

Thus, the holding in *Syvock* [*] that "direct evidence" or "compelling circumstantial evidence" of an intent to discriminate is required in order to award liquidated damages under the ADEA is consistent with the plain meaning of the statute, the intent of Congress and the First Circuit standard in *Loeb*.

---

[*] The *Syvock* standard was cited with approval in *Orsel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 757-59 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983). In addition, the "specific intent" standard was approved after careful discussion in *Kogen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1165-66 (S.D.N.Y. 1983); *see also Whittlesey v. Union Carbide Corp.*, 567 F. Supp. 1320, 1330 (S.D.N.Y. 1983). Both of these district court cases were decided prior to the Second Circuit's decision in the instant case.

In the instant case, the Second Circuit held that "plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 713 F.2d at 956. Citing no more than the fact that "TWA was clearly aware of the 1978 ADEA amendments," *id.* at 957, the court held TWA liable for liquidated damages. Liability for double damages based on such a minimal showing will result in virtually automatic doubling of damages in ADEA cases.

B. A Standard That Declines To Require "Specific Intent" Ignores Congressional Intent to Limit Liquidated Damages To Conscious Violations

In addition to the Second Circuit decision herein, a number of other lower courts have adopted varying standards for awarding liquidated damages which decline to impose a requirement of "specific intent" to violate the Act. Each of these decisions, however, fails to consider adequately that a "two-tier" statutory framework for back pay and liquidated damages was established by Congress precisely in order to prevent an *automatic* award of liquidated damages. Particularly in disparate treatment actions, such as the instant case, the failure of these courts to require a "specific intent" standard has resulted in the virtual automatic doubling of damages in direct contravention of Congressional intent.

A brief review of decisions adopting standards for "willful" violations in the absence of a specific intent to violate the Act clearly demonstrates the problems associated with such approaches. In *Wehr v. Bur-*

roughs Corp., 619 F.2d 276, 283 (3d Cir. 1980), the Third Circuit stated that:

> [W]e conclude that Congress did not intend to restrict the meaning of "willful" . . . to intentional violations of the ADEA. It is sufficient to prove that the company discharged the employee because of age and that the discharge was voluntary and not accidental, mistaken, or inadvertent. In our view, it would also be sufficient to prove that the discharge was precipitated in reckless disregard of consequences.

Thus, the Third Circuit standard for willfulness does not require a "specific intent" to violate the Act and allows willfulness to be shown by a *reckless disregard of the consequences* of the defendant's action. Such a standard is inconsistent with common meanings of the term "willful" and is likely to result in the nearly automatic award of liquidated damages, since it fails to focus on the state of mind of the defendant at the time of the violation.[11]

In *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1113-14 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981),

---

[11] The Third Circuit's standard also is inconsistent with its own definition of "willingfulness" established in the context of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*, where the court stated that:

> Willfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious and deliberate flaunting of the Act. Willful means more than merely voluntary action or omission—it involves an element of obstinate refusal to comply. *Frank Irey, Jr., Inc. v. OSHRC*, 519 F.2d 1200, 1207 (3d Cir. 1974), *aff'd in banc*, 519 F.2d 1215 (1975), *aff'd on other grounds sub nom. Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977).

and *Crosland v. Charlotte Eye, Ear and Throat Hosp.*, 686 F.2d 208, 217 (4th Cir. 1982), the Fourth Circuit has adopted the standard that "an employer acts willfully and subjects himself to [liability] if he knows or has reason to know, that his conduct is governed by [the Act]." Since nearly all employers will "know" or "have reason to know" that their conduct is "governed by the Act," the approach of the Fourth Circuit is particularly likely to result in an award of liquidated damages if used as an instruction to a jury, even where the defendant's actions were not "willful" as that term was intended by Congress and as it is commonly understood.

In *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1184 (6th Cir. 1983), the Sixth Circuit determined that it was not necessary for the plaintiff to show that a defendant acted with a specific intent to violate the Act. 696 F.2d at 1184. Rather, the court adopted the following standard for demonstrating "willfulness":

> We hold that in order to show willfulness, an ADEA plaintiff must show that the employer's actions were voluntary and intentional. The employer is not necessarily shielded from liability because he is unaware of the "implications of his actions under the Act." Alternatively, the plaintiff may receive liquidated damages if he shows that the employer was reckless in not knowing that his actions were governed by the ADEA or that the employer acted in reckless disregard of whether his actions were covered by the ADEA. 696 F.2d at 1184. (Footnote omitted).

Although the court in *Blackwell* stated that "every showing of intentional discrimination does not entitle

the plaintiff to liquidated damages," *id.*, the failure of the court to require specific intent virtually mandates an award of liquidated damages, even in cases in which Congress clearly did not intend such awards.

Finally, in *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981), the Ninth Circuit noted that "the award of liquidated damages is in effect a substitution for punitive damages and is intended to deter *intentional* violations of the ADEA." 640 F.2d at 979 (emphasis added). Despite this acknowledgment, the court declined to impose a "specific intent" requirement and found that "an ADEA plaintiff who establishes a knowing and voluntary violation of the Act is entitled to liquidated damages." *Id.* at 980. Like the other standards that fail to incorporate a showing that the ADEA violation was "conscious" or with the "specific intent" to violate the Act, the Ninth Circuit standard makes it highly likely that liquidated damages will be imposed without the requisite showing of "willfulness" that Congress intended.[13]

In disparate treatment actions, such as the instant case, the approaches outlined above have resulted in the nearly automatic imposition of liquidated dam-

---

[13] One commentator has noted the problems associated with a standard, such as that adopted by the Second Circuit herein, that does not require proof of "specific intent" to violate the Act. The commentator noted correctly that under such a standard:

> [A]n employer would be guilty of a willful violation if he intended to discharge the employee, even if he did not mean to violate the Act. Under this construction, virtually every violation would be willful. Smith & Leggette, *Recent Issues in Litigation Under the Age Discrimination in Employment Act*, 41 Ohio St. L. J. 349, 369 (1980).

ages where a violation of the Act is found.[14] For example, in awarding liquidated damages in an ADEA case, the Second Circuit in *Goodman v. Heublein, Inc.*, 645 F.2d 127, 131 n.6 (2d Cir. 1981), stated that:

> In finding, under proper instructions, that Heublein had denied Goodman a promotion *because of* age, the jury necessarily concluded that Heublein's action was intentional. In a discriminatory treatment case, such as this, an employer's action, if taken *because of* an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reason. On the other hand, in a discriminatory impact case, where an employer acts on the basis of some standard that is shown, in practice, to have a disproportionate impact on some group identifiable by a characteristic such as age, a finding of liability will not inevitably mean that the employer discriminated intentionally. (Emphasis in original).

The Second Circuit reaffirmed its adherence to automatic liquidated damages, at least in disparate treatment cases, in the instant case. 713 F.2d at 956.[15]

---

[14] In *Cowen v. Standard Brands, Inc.*, 572 F. Supp. 1476 (N.D. Ala. 1983), the court found "no material difference between 'intentional' discrimination and 'willful' discrimination," 572 F. Supp. at 1581, and determined that "as a practical matter, liquidated damages are virtually automatic if there is to be any monetary recovery at all by the employee." *Id.*

[15] The importance of requiring a "specific intent" standard for liquidated damages and of not automatically awarding such damages in disparate treatment cases is enhanced by the continuing debate over the appropriateness of using a "disparate impact" theory in ADEA cases. EEAC concurs with several scholars who have argued that the disparate impact doctrine should not be applied in age discrimination cases be-

The approaches to liquidated damages in disparate treatment cases of the First and Seventh Circuits in *Loeb* and *Syvock* are more consistent with the "two-tier" statutory scheme established by Congress. As noted above, the Seventh Circuit held in *Syvock* that "[i]n a disparate treatment case, a finding of willfulness will generally require some direct evidence of discriminatory intent toward the plaintiff or a showing that, at the time of the alleged discriminatory action, the employer was motivated to discriminate or engaged in a pattern of discriminating against older employees." 665 F.2d at 156 n.10. The court rejected an automatic award of liquidated damages in disparate treatment cases, stating that "[w]e find nothing in 29 U.S.C. § 626(b) (1976), or in the legis-

---

cause the Act prohibits only intentional discrimination, which is properly analyzed under the disparate treatment theory. *See, e.g.*, A. Blumrosen, *Interpreting the ADEA: Intent or Impact*, in Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners 68 (1982); Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837 (1982). As Justice Rehnquist noted in his dissent to the denial of certiorari in *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981), "[t]his Court has never held that proof of discriminatory impact can establish a violation of the ADEA, and it certainly has never sanctioned a finding of a violation where the statistical evidence revealed that a policy, neutral on its face, has such a significant impact on all candidates concerned, not simply the protected age group." 451 U.S. 945, 949 (Rehnquist, J., dissenting). If ADEA cases are limited to intentional discrimination, the automatic award of liquidated damages in disparate treatment cases would wholly undermine the "two-tier" approach to liquidated damages, contrary to the intent of Congress. In any event, it is not necessary for the Court to decide herein the issue of whether the ADEA property is limited to allegations of disparate treatment, since this is a disparate treatment case.

lative history of the ADEA, to support such a result." *Id.* at 155.[*] It is submitted that Congress did not intend that liquidated damages would be awarded automatically in disparate treatment cases and that the requirement of a "specific intent" to violate the Act more accurately reflects Congress' wishes.

The problems inherent in any approach to liquidated damages that does not require a showing that the employer specifically intended to violate the Act are aptly demonstrated by the instant case. Following the 1978 amendments to the ADEA, TWA altered its previous policy regarding the retirement at age sixty of "flight engineers." This action was taken by TWA in a conscious effort to *comply* with the Act. In addition, with its revised policy, TWA became the only trunk airline voluntarily to permit pilots over age sixty to continue working as flight engineers. Congress could not have intended liquidated damages to be awarded in such an instance, where the employer expressly took steps beyond those taken by its competitors to insure that it would be in compliance

---

[*] The court stated that simply because the jury did not accept the employer's justifications and rather found such justifications to be a pretext for discrimination did not warrant an inference that the employer acted "consciously." *Id.* at 157. In doing so, the court explained that:

> Age discrimination resulting from unconscious stereotyping of an older person's abilities violates the ADEA although it may not have occurred with the state of mind necessary to a finding of willfulness. Yet it is likely that an employer will attempt to offer a legitimate reason for its actions at trial to avoid liability in the first instance. Because the defendant's trial explanation is not believed does not mean that its original actions were in fact consciously discriminatory. *Id.*

with the law. If liquidated damages can be awarded under these circumstances, it is clear that the "standard" of "willfulness" adopted by the Second Circuit is in effect a "standard" of automatic doubling of damages in any case where a violation of the Act is found to exist.

II. A UNION FOUND TO HAVE VIOLATED THE ACT SHOULD BE HELD ACCOUNTABLE FOR MONETARY DAMAGES

The Second Circuit herein held that the ADEA "does not permit actions to recover monetary damages, including back pay, against a labor organization." 713 F.2d at 907. In doing so, the court ignored the clear intent of Congress to end age discrimination by both employers *and unions* and the strong policy reasons favoring such awards against unions. It is submitted that a monetary award against unions found to be in violation of the ADEA is consistent with the statutory language and purposes of the Act and will serve the important purpose of deterring union discrimination.

It is undisputed that labor organizations are prohibited by the ADEA from discriminating on the basis of age. Section 4(c) of the ADEA, 29 U.S.C. § 623(c), expressly makes it unlawful for a labor organization "to discriminate against . . . any individual because of his age." *See also* 29 U.S.C. §§ 623 (d) and (e). In addition, the legislative history clearly is expressive of the intent of Congress to prohibit age discrimination by labor organizations. *See, e.g.*, 113 Cong. Rec. 2667 (remarks of Sen. Yarborough); 113 Cong. Rec. 34,740 (remarks of Rep. Perkins); 113 Cong. Rec. 34,743 (remarks of Rep. Kelly) (1967). Thus, there are compelling reasons

in the statutory prohibitions and legislative history of the ADEA for holding unions liable for monetary damages for proven violations of the Act.[18]

In addition to the legislative history and the provisions of the ADEA prohibiting discrimination by labor organizations, the language of the remedy provision of the ADEA supports an award of monetary damages against unions. Section 7(b) of the ADEA, 29 U.S.C. § 626(b), provides in pertinent part that:

> In any action brought to enforce this chapter the court shall have jurisdiction to grant *such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter*, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

As noted above, since the legislative history clearly reveals that an important "purpose" of the Act was

---

[18] In *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77 (1981), this Court held that an employer had neither a federal statutory right under Title VII or the Equal Pay Act nor a federal common law right to *contribution* from a union that allegedly bore at least partial responsibility for the statutory violations. That case, however, involved a claim for contribution brought by an *employer* against a union and is not instructive of the issue presented in the instant case. In *Northwest Airlines*, this Court stated that:

> Because we conclude that no right to contribution exists under either the statute or the federal common law, we need not decide whether the elements of a contribution claim have been established in this case. Therefore, we need not and do not decide the question whether employees have an implied right of action for backpay against their unions for violations of the Equal Pay Act. 451 U.S. at 88 n.20.

to prevent union discrimination, a monetary award against union violators logically falls within the language of the Act providing for "such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter."

Although there have been few cases addressing the issue of union liability for monetary relief under the ADEA, it is submitted that the reasoning most consistent with the legislative purpose of ending union discrimination on the basis of age is contained in *EEOC v. Air Line Pilots Ass'n*, 489 F. Supp. 1003 (D. Minn. 1980), *reversed on other grounds*, 661 F.2d 90 (8th Cir. 1981). In that case, the district court rejected the argument of ALPA that the employer alone is responsible for monetary awards under the ADEA. The court first "noted that ALPA has cited the court to nothing in the legislative history of the ADEA suggesting unions should be immune from damages liability, and the court also has found no such indication in the Act's legislative history or in any case law under the Act." 489 F. Supp. at 1009 n.5. Noting the language of Section 626(b), cited above, the court stated that "[i]t would not effectuate the purposes of the ADEA to allow unions to violate the act without having to be concerned with being held liable for any resulting monetary damages." *Id.* (Footnote omitted). In holding the union liable for monetary damages, the court also relied on "analogous case law under Title VII." [14] *Id.*

---

[14] *See, e.g., Donnell v. General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978); *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876, 881 (8th Cir. 1977), *cert. denied*, 434 U.S. 891 (1977).

A monetary award against unions found to have violated the Act best serves the Congressional intent of eliminating age discrimination by unions and is most consistent with decisions under analogous statutory schemes.[15] Without the likelihood of monetary liability, there is no effective deterrent to prevent unions from engaging in unlawful discrimination.[16]

---

[15] In *Hodgson v. Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), *aff'd sub nom. Hodgson v. Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972), a case brought under the Equal Pay Act, the court held that a union that had jointly violated the Equal Pay Act was liable for back wages due. In so holding, the court stated that:

> If [the union's] position were correct, a union which had caused an employer to illegally withhold wages from its employees would be subject to no more than future restraint. Its past violation of the law would go uncorrected and unpunished; it could merely be prevented from breaking the law in the future. There is no apparent reason why a union which violated Section 206(d) should be treated any differently from an employer violator. Equitably, both should be subject to the same type of decree which in order to give full relief would necessarily include a provision requiring the payment of wages illegally withheld or caused to be withheld as well as one prohibiting any future violations of the law. 326 F. Supp. at 373.

This reasoning in an analogous situation under the Equal Pay Act is equally persuasive in the instant ADEA case.

[16] The importance of providing "incentives" for unions to comply with the law was recognized last term in a different context in *Bowen v. U.S. Postal Service*, 103 S.Ct. 588, 597 (1983), where this Court noted that:

> In the absence of damages apportionment where the default of both parties contributed to the employee's injury, incentives to comply with the grievance procedure will be diminished.

See also Vaca v. Sipes, 386 U.S. 171 (1967).

Given the Congressional intent to prohibit such discrimination, the language of Section 626(b) itself, and the need for such a deterrent to unlawful discrimination, it is submitted that a union that has engaged in unlawful discrimination under the ADEA should be held liable for monetary damages.[20]

CONCLUSION

For the foregoing reasons, it is submitted that the decision of the Second Circuit herein should be reversed.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
THOMAS R. BAGBY
McGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae
Equal Employment
Advisory Council

May 17, 1984

---

[20] In *Neuman v. Northwest Airlines*, 28 FEP Cases 1488 (N.D. Ill. 1982), the court held that a plaintiff was not entitled to recover monetary damages from ALPA under the ADEA. In doing so, the court relied principally on decisions under the FLSA and failed to accord appropriate weight to the legislative history of the ADEA, the language of Section 626 itself and the need for an effective deterrent to union discrimination. It is submitted that the decision in *EEOC v. Airline Pilots Ass'n* is more consistent with the intent of Congress and should be endorsed by this Court.

PETITIONER'S

BRIEF

Nos. 83-997, 83-1225

FILED
MAY 31 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,
v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
Petitioner in No. 83-1225

MICHAEL E. ABRAM
330 West 42nd Street
New York, New York 10036
(212) 563-4100
Counsel of Record for Air Line Pilots Association, International

JAY P. LEVY-WARREN
ANN E. O'SHEA
COHEN, WEISS and SIMON
Of Counsel

WILSON - EPES PRINTING CO., INC. - 783-0288 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether airline captains who are subject to a bona fide occupational qualification (BFOQ) under § 4(f)(1) of the Age Discrimination in Employment Act may be retired, where the plain meaning and legislative history of § 4(f)(1) authorize mandatory retirement at an age which is a BFOQ.

PARTIES

Air Line Pilots Association, International, Trans World Airlines, Inc., Harold H. Thurston, Christopher J. Clark, C. A. Parkhill and the Equal Employment Opportunity Commission are parties to the decision sought to be reviewed here. In addition Nicholas Vasilaros, *et al.*, were intervenors in a consolidated case in the court below, as to which review by this Court has not been sought.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
PARTIES	1
TABLE OF AUTHORITIES	iv
PRELIMINARY STATEMENT	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	4
A. TWA's Employment of Flight Deck Crew Members	4
B. TWA's Retirement Practices	5
C. Procedural History	6
SUMMARY OF ARGUMENT	7
ARGUMENT	8
SECTION 4(f)(1) OF THE ADEA AUTHORIZED TWA TO CONTINUE ITS POLICY OF RETIRING PILOTS WHO WERE SUBJECT TO AN AGE-BASED BONA FIDE OCCUPATIONAL QUALIFICATION.	8
A. In 1978, Congress Restricted the Permissible Range of Mandatory Retirement Practices, But Continued to Authorize Mandatory Retirement at an Age Which Is a BFOQ.	8
B. The Plain Meaning of § 4(f)(1), as Buttressed by the Legislative History of the ADEA, Authorizes the Mandatory Retirement of Pilots Disqualified by the FAA Age 60 Rule.	15
CONCLUSION	20

TABLE OF AUTHORITIES

CASES — Page

Allied Chemical & Alkali Workers of America v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) — 12
American Tobacco Co. v. *Patterson*, 456 U.S. 63 (1982) — 15, 16, 19
Bell v. *New Jersey and Pennsylvania*, —— U.S. ——, 103 S.Ct. 2187 (1983) — 18
California Brewers Association v. *Bryant*, 444 U.S. 598 (1980) — 12
Diamond v. *Chakraborty*, 447 U.S. 303 (1980) — 19
Dickman v. *Commissioner*, —— U.S. ——, 104 S.Ct. 1086 (1984) — 16, 17, 18
EEOC v. *Wyoming*, —— U.S. ——, 103 S.Ct. 1054 (1983) — 13, 15
Goodin v. *Clinchfield Railroad*, 125 F. Supp. 441 (E.D. Tenn. 1954), *aff'd*, 229 F.2d 578 (6th Cir.), *cert. denied*, 351 U.S. 953 (1956) — 12
Heckler v. *Mathews*, —— U.S. ——, 104 S.Ct. 1387 (1984) — 19
INS v. *Phinpathya*, —— U.S. ——, 104 S.Ct. 584 (1984) — 15, 16, 18
Inland Steel Co. v. *NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied in relevant part*, 336 U.S. 960 (1949), *otherwise aff'd*, 339 U.S. 382 (1950) — 12
Kosak v. *United States*, —— U.S. ——, 104 S.Ct. 1519 (1984) — 15, 18
McMullans v. *Kansas, Oklahoma and Gulf Railroad*, 229 F.2d 50 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956) — 12
Mobil Oil Corp. v. *Higginbotham*, 436 U.S. 618 (1978) — 19
Mohasco Corp. v. *Silver*, 447 U.S. 807 (1980) — 16
NLRB v. *Amax Coal Co.*, 453 U.S. 322 (1981) — 11
Northwest Airlines, Inc. v. *Transport Workers Union*, 451 U.S. 77 (1981) — 15
Perrin v. *United States*, 444 U.S. 37 (1979) — 11
Potomac Electric Power Co. v. *Director, Office of Workers' Compensation Programs*, 449 U.S. 268 (1980) — 16, 17

TABLE OF AUTHORITIES—Continued

Page

Roberts v. *Lehigh and New England Railroad*, 323 F.2d 219 (3d Cir. 1963) — 12
Rombough v. *FAA*, 594 F.2d 893 (2d Cir. 1979) — 5
Tennessee Valley Authority v. *Hill*, 437 U.S. 153 (1978) — 16, 18, 19
United Mine Workers of America Health and Retirement Funds v. *Robinson*, 455 U.S. 562 (1982) — 12
United States v. *Rodgers*, —— U.S. ——, 52 U.S.L.W. 4510 (U.S. May 1, 1984) — 15

STATUTES

Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* — *passim*
Section 4(a), 29 U.S.C. § 623(a) — 2-3, 7, 8
Section 4(c)(3), 29 U.S.C. § 623(c)(3) — 3, 7, 8
Section 4(d), 29 U.S.C. § 623(d) — 9
Section 4(f)(1), 29 U.S.C. § 623(f)(1) — *passim*
Section 4(f)(2), 29 U.S.C. § 623(f)(2) — *passim*
Section 4(f)(3), 29 U.S.C. § 623(f)(3) — 3, 8, 18
Section 12(a), 29 U.S.C. § 631(a) — 3-4, 13
Section 12(c), 29 U.S.C. § 631(c) — 13

Judiciary and Judicial Procedure Act
28 U.S.C. § 1254(1) — 2

Employment Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.*
Section 203, 29 U.S.C. § 1053 — 17

Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* — 4
Section 2, Seventh, 45 U.S.C. § 152, Seventh — 6
Section 6, 45 U.S.C. § 156 — 6

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* — 16
Section 703(h), 42 U.S.C. § 2000e-2(h) — 12, 19

RULES AND REGULATIONS
14 C.F.R. § 121.383(c) (1979) — 4, 5

TABLE OF AUTHORITIES—Continued

LEGISLATIVE SOURCES	Page
H.R. Rep. No. 527 (Pt. 1), 95th Cong., 1st Sess. (1977)	10, 13, 18
S. Rep. No. 493, 95th Cong., 1st Sess. (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 504	9, 13
H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 504, 528	10
123 Cong. Rec. 30,566 (1977)	11
123 Cong. Rec. 34,296 (1977)	11
123 Cong. Rec. 34,297 (1977)	11
123 Cong. Rec. 34,318-34,319 (1977)	11
124 Cong. Rec. 7886-7887 (1978)	11
Pub. L. No. 90-202, 81 Stat. 602	8
Pub. L. No. 95-256, 92 Stat. 189:	
Section 2(a), 92 Stat. 189	8, 9, 13
Section 3(a), 92 Stat. 189-190	9, 13
Section 3(b), 92 Stat. 190	9, 13
MISCELLANEOUS	
Aaron, *Reflections on the Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532 (1962)	12-13
United States Secretary of Labor, *The Older American Worker: ...ge Discrimination in Employment* (1965)	12, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-997, 83-1325

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,
v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
Petitioner in No. 83-1325

PRELIMINARY STATEMENT

Air Line Pilots Association, International ("ALPA"), petitioner in No. 83-1325 and respondent in No. 83-997, respectfully submits this brief on the merits as petitioner in No. 83-1325.[1]

[1] Cases No. 83-997 and No. 83-1325 were consolidated pursuant to an order of this Court entered on April 2, 1984 (52 U.S.L.W. 3720).

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 713 F.2d 940 and appears in the appendix to the petition for certiorari of Trans World Airlines, Inc. ("TWA") in No. 83-997 beginning at page A-1. The opinion of the United States District Court for the Southern District of New York is officially reported at 547 F.Supp. 1221 and appears in the same appendix beginning at page A-44.

JURISDICTION

This Court's jurisdiction exists by virtue of 28 U.S.C. § 1254(1). TWA petitioned this Court for a writ of certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Second Circuit. ALPA subsequently filed a conditional cross-petition. Both petitions were filed within 90 days of the denial of rehearing by the Court of Appeals. TWA's petition was granted on February 27, 1984 (52 U.S.L.W. 3631), and ALPA's petition was granted on April 2, 1984 (52 U.S.L.W. 3720).

STATUTES AND REGULATION INVOLVED

Section 4(a) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a), provides:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

> (3) to reduce the wage rate of any employee in order to comply with this chapter.

Section 4(c)(3) of the ADEA, 29 U.S.C. § 623(c)(3), provides:

> It shall be unlawful for a labor organization—
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 4(f) of the ADEA, 29 U.S.C. § 623(f), provides:

> It shall not be unlawful for an employer, employment agency or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631 of this title because of the age of such individual; or
>
> (3) to discharge or otherwise discipline an individual for good cause.

Section 12(a) of the ADEA, 29 U.S.C. § 631(a), provides:

> (a) The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

Part 121.383(c) of the Federal Air Regulations, 14 C.F.R. § 121.383(c), provides:

> No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

STATEMENT OF THE CASE

A. TWA's Employment of Flight Deck Crew Members

ALPA is the authorized bargaining representative under the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.*, for the approximately 3,000 flight deck crew members employed by TWA, A-4—A-6,[1] who serve in the positions of captain, first officer, international relief officer ("IRO") (on a few overseas routes) and flight engineer. J.A. 339. The terms and conditions of employment of crew members are governed by collective bargaining agreements ("Working Agreements") between TWA and ALPA. A-6.

Seniority is based on length of service as a crew member and governs the allocation of work assignments as well as transfers from one position to another. J.A. 294, 302-314. Flight engineer is the entry position for TWA flight deck employment, although certain "career" flight engineers hired prior to 1962 have priority rights to

[1] References to "A- " are to the decision of the Second Circuit Court of Appeals which appears in the Appendix to TWA's petition for certiorari filed December 16, 1983. References to "J.A." are to the Joint Appendix filed in the Second Circuit pursuant to permission of this Court by order dated March 19, 1984 (52 U.S.L.W. 3647); all parties have agreed to cite to the Joint Appendix below.

flight engineer positions. J.A. 210-214. In accordance with the seniority system embodied in the Working Agreement, a captain may bid for vacancies in the flight engineer position, J.A. 305; in specified circumstances he may also displace a less senior incumbent flight engineer, J.A. 311. Seniority rights are extinguished when a crew member's services are terminated, whether by discharge, resignation or retirement. J.A. 294.

The Federal Aviation Administration ("FAA") prohibits flight deck crew members from serving as "pilots" (captains) and "co-pilots" (first officers) once they reach age 60. 14 C.F.R. § 121.383(c) ("Age 60 Rule"). *See generally Rombough* v. *FAA*, 594 F.2d 893 (2d Cir. 1979). The FAA does not set a maximum age limit for flight engineers. A-7. It is undisputed in this action that an age less than 60 is a bona fide occupational qualification ("BFOQ") for TWA captains and first officers under § 4(f)(1) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(f)(1). A-7—A-8.

B. TWA's Retirement Practices

From the issuance of the FAA Age 60 Rule in 1959 to August, 1978, TWA retired all flight deck crew members (including flight engineers) at age 60, as allowed by § 4.2 of the collectively bargained retirement plan (which requires crew members to retire at their normal retirement dates [age 60], "unless written approval of the company is granted for continuance in employment"). J.A. 243, 410.

The 1978 amendments to the ADEA, effective April 6, 1978, eliminated a bona fide employee benefit plan defense to mandatory retirement at age 60. Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978). In August, 1978, TWA decided to permit flight engineers to continue in their jobs past age 60, but did not change its policy of retiring captains and first officers when they were sub-

just to the FAA Age 60 Rule. J.A. 425. TWA applied its policy change retroactively by re-employing any flight engineer who had reached age 60 on or after April 6, 1978. A-9.

C. Procedural History

TWA's policy was challenged in two lawsuits. In *Thurston* v. *TWA*, three TWA captains who requested to serve as flight engineers after their 60th birthdays but were retired at age 60, brought an action against TWA and ALPA for violation of the ADEA; intervenor EEOC represents an additional 7 former captains who were also involuntarily retired after April 6, 1978.[9] A-10 n.10. *Thurston* was consolidated with *ALPA* v. *TWA*, an action challenging the August, 1978, policy permitting service of flight engineers beyond age 60 as a unilateral change in working conditions contrary to § 2, Seventh as to § 6 of the RLA, 45 U.S.C. § 152, Seventh and § 156.

The district court entered summary judgment against individual plaintiffs and the EEOC in *Thurston* v. *TWA*, and entered summary judgment in favor of TWA in *ALPA* v. *TWA*.

The Court of Appeals reversed the judgment in *Thurston*, and entered summary judgment in favor of plaintiffs. With respect to "[t]he employment practice at issue in this lawsuit—the severing of age 60 captains from the company," the court held that "because TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers, the *Thurston* litigants and the EEOC claimants

[9] Three of these 10 captains reached age 60 prior to August 1978; four of the captains reached age 60 between August and November, 1978. One reached age 60 in 1979; one reached age 60 in 1980; one reached age 60 in 1981. *See* TWA Brief at 10 n.10.

must prevail on their ADEA claims." A-26, 31. The court further held that ALPA violated § 4(c)(3) of the ADEA, 29 U.S.C. § 623(c)(3). The court rejected ALPA's argument that § 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1), authorized TWA to retire captains and first officers at an age which is a BFOQ.[9] The Court of Appeals affirmed the judgment in *ALPA* v. *TWA*; ALPA has not sought review of that decision.

SUMMARY OF ARGUMENT

TWA correctly asserts that its August, 1978, policy does not discriminate on the basis of age, and that the district court therefore properly entered summary judgment in favor of defendants. TWA Brief at 16-29. ALPA agrees that TWA's policy complies with § 4(a) of the ADEA, and further submits that § 4(f)(1) of the ADEA authorizes an employer "to take any action otherwise prohibited under [§ 4(a)] . . . where age is a [BFOQ] . . . ." An age less than 60 is a BFOQ for TWA captains. "[A]ny action otherwise prohibited" includes mandatory retirement. Accordingly, TWA lawfully retired the individual plaintiffs and EEOC claimants, who were employed as captains when they turned 60.

The Second Circuit ruled that "involuntary retirement" at an age which is a BFOQ is lawful in some circumstances but not in others, A-30, depending on the employer's treatment of employees who are unable to continue to work in a particular job for "non-age reasons." A-31. However, the legislative history of the ADEA demonstrates that Congress intended to authorize the "retirement" of employees at an age which is a BFOQ, and offers no support for a distinction between

[9] The Court of Appeals also ruled that ALPA was not responsible to plaintiffs for monetary damages as a matter of law. A-38. This Court has granted TWA's petition for certiorari (opposed by plaintiffs) on this issue in 80-997. ALPA will brief this issue as respondent in No. 80-997.

permissible and impermissible use of mandatory retirement based on policies applicable to employees in other circumstances. In the light of the plain meaning of the statutory language and the legislative history explicitly approving mandatory "retirement" at an age which is a BFOQ, § 4(f)(1) should be read to authorize TWA's involuntary retirement of captains at age 60.

ARGUMENT

SECTION 4(f)(1) OF THE ADEA AUTHORIZED TWA TO CONTINUE ITS POLICY OF RETIRING PILOTS WHO WERE SUBJECT TO AN AGE-BASED BONA FIDE OCCUPATIONAL QUALIFICATION.

A. In 1978, Congress Restricted the Permissible Range of Mandatory Retirement Practices, But Continued to Authorize Mandatory Retirement at an Age Which Is a BFOQ.

Section 4(a) of the ADEA prohibits an employer from discharging an individual because of age and § 4(c)(3) makes it unlawful for a labor organization to cause or attempt to cause an employer to discriminate in violation of § 4. 29 U.S.C. §§ 623(a), 623(c)(3). Section 4(f) of the ADEA defines the scope of authorized employment practices. Section 4(f)(3) specifies that an employer may "discharge" or "discipline an individual for good cause." 29 U.S.C. § 623(f)(3). As enacted in 1967, § 4(f)(2) specified that it shall not be unlawful "to observe the terms" of a bona fide seniority system or employee benefit plan. Pub. L. No. 90-202, § 4(f)(2), 81 Stat. 602, 603. Section 4(f)(1) was written in broader terms: It provided that "[i]t shall not be unlawful for an employer . . . or labor organization to take any action otherwise prohibited . . . [under §§ 4(a), (b), (c), or (e)] where age is a [BFOQ] or where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). The only express restriction on the scope of

the far-reaching language of § 4(f)(1) is that it does not apply to actions prohibited by § 4(d) of the ADEA, 29 U.S.C. § 623(d) (which bars discrimination based on opposition to unlawful practices or participation in the investigation of unlawful practices).

In the 1978 ADEA amendments, Congress prohibited mandatory retirement practices justified solely by a seniority system or employee benefit plan, by *modifying* § 4(f)(2) to state that "no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual."[8] 29 U.S.C. § 623(f)(2). At the same time, Congress decided to continue unchanged the authorization "to take any action otherwise prohibited . . . where age is a [BFOQ]." Significantly, Congress did not amend § 4(f)(1) to add a restriction on mandatory retirement similar to the proviso added to § 4(f)(2).

In clarifying the 1978 amendments to § 4(f)(2), Congress emphasized that employers could continue to retire employees subject to a BFOQ. The Senate adopted an amendment to § 4(f)(1) providing that an employer or labor organization "may take any action otherwise prohibited [by the ADEA] . . . *including the establishment of a mandatory retirement age less than* [age 70] . . . where age is a [BFOQ]."[9] In Conference Committee, the

---

[8] Pub. L. No. 95-256, § 2(c), 92 Stat. 189 (1978). In 1978, Congress also extended the coverage of the Act to age 70, Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978), and added exemptions for "compulsory retirement" of certain persons after age 65 who are in an "executive or high policy-making position." *Id.* Congress also added an exemption for "compulsory retirement" of any person after age 65 "who is serving under a contract of unlimited tenure . . . at an institution of higher education. . . ." *Id.*, 92 Stat. 190. Section 2(b)(3) of the 1978 ADEA amendments repealed the latter provision as of July 1, 1982. Pub. L. No. 95-256, § 2(3), 92 Stat. 190.

[9] S. Rep. No. 493, 95th Cong., 1st Sess. 11, 23 (1977) (hereinafter "S. Rep."), *reprinted in* 1978 U.S. Code Cong. & Ad. News 504, 514 (proposed amendments in italics).

Senate conferees withdrew the amendment because "the conferees agreed that the amendment neither added to nor worked any change upon present law."[7] *See* A-27.

The House Committee Report expressed an intent both to permit "mandatory retirement or other employment practices" where age is a BFOQ, and not to require the use of alternative procedures to mandatory retirement:

> While it is the primary purpose of this legislation to limit mandatory retirement and other employment discrimination for non-Federal employees aged 40-69, and to prohibit unreasonable mandatory retirement with respect to Federal employment, *it is not intended that the bill prohibit mandatory retirement or other employment practices where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular activity such as provided for in the current law in section 12(b) and 4(f)(1).* It is recognized that certain mental and physical capacities may decline with age, and in some jobs with unusually high demands, age may be considered a factor in hiring and retaining workers.
>
> * * *
>
> This legislation does not require employers to provide special working conditions for older workers to allow them to remain or become employed. *While special jobs, part-time employment, retraining and transfers to less physically demanding jobs may be of great benefit to the older employees and the employer alike, these activities are not required by this legislation.*

H.R. Rep. No. 527 (Pt. 1), 95th Cong., 1st Sess. 12 (1977) (hereinafter "H.R. Rep.") (emphasis added).

Moreover, the floor debates in the House and Senate confirm that Congress fully intended to exempt employees subject to a BFOQ from the Act's prohibitions against mandatory retirement. Rep. Weiss, one of the authors of the 1978 amendments, stated:

> Currently, there are three exceptions to the act. First, Section 4(f)(1) *exempts workers in hazardous occupations from the protections of the act.* Second, section 4(f)(3) states that a worker, although covered by the act, can be discharged for good cause. No one can dispute the intent of these two exceptions.

123 Cong. Rec. 30,566 (1977) (emphasis added).[8] Senator Williams, a floor manager of the 1978 amendments in the Senate and the author of the Senate's proposed amendment to § 4(f)(1), explained that his amendment would confirm that once a BFOQ had been established, "an employer may lawfully require mandatory retirement at that specified age." 123 Cong. Rec. 34,296 (1977).[9]

Congress' understanding of the term "retirement" is not open to doubt. As a matter of its ordinary meaning and usage,[10] "retirement" refers to the complete termination of the employment relationship. It is "commonly ac-

---

[7] H. Conf. Rep. No. 950, 95th Cong., 2d Sess. 7 (1978), *reprinted* in 1978 U.S. Code Cong. & Ad. News 528, 529 (emphasis added).

[8] Following the Conference Committee's consideration of the amendments, Rep. Weiss reiterated that: "Section 4(f)(1) of the ADEA exempts situations in which age is a bona fide occupational exception [sic] . . . there is universal acceptance of [this] provision." 124 Cong. Rec. 7886-7887 (1978).

[9] *See also* 123 Cong. Rec. 34,297, 34,318-319 (1977) (remarks of Sen. Javits).

[10] *See Perrin* v. *United States*, 444 U.S. 37, 42 (1979) (words that Congress has used are to be given their "ordinary, contemporary, common meaning" unless otherwise defined); *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981) (where Congress uses terms that have accumulated a "settled" meaning, it must be assumed that Congress intended to incorporate that meaning).

cepted . . . in industrial relations" [11] that "retirement" encompasses the elimination of all employment rights. An employee who retires from his job on November 30, 1984, would not expect to report to work for assignment to another position in the same company on December 1, 1984. This Court has held that retired employees cannot be members of a bargaining unit certified by the National Labor Relations Board precisely because retirement, in contrast to lay-off or leave, involves the termination of any expectation of future employment. *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 165-66, 168 (1971).[12]

That retirement refers to termination from employment was also recognized in the Report of the Secretary of Labor, *The Older American Workers: Age Discrimina-*

[11] *California Brewers Association* v. *Bryant*, 444 U.S. 598, 605 (1980). "Title VII does not define the term seniority system, and no comprehensive definition of the phrase emerges from the legislative history of § 703(h). . . . It is appropriate, therefore, to begin with commonly accepted notions about 'seniority' in industrial relations, and to consider those concepts in the context of Title VII and this country's labor policy." 444 U.S. at 605. Indeed, the meaning of "mandatory retirement" is far more precise than "seniority," which applies to a vast range of employment practices used to take length of service into account in making employment decisions. *See generally* Aaron, *Reflections on the Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532 (1962).

[12] *Accord United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562, 574-75 (1982). *See also Inland Steel Co.* v. *NLRB*, 170 F.2d 247, 251-52 (7th Cir. 1948), *cert. denied in relevant part*, 336 U.S. 960 (1949), *otherwise aff'd*, 339 U.S. 382 (1950) (compulsory retirement practices are a mandatory subject of bargaining in part because they result in elimination of seniority rights embodied in collective bargaining agreement). *See generally Roberts* v. *Lehigh & New England Railroad*, 323 F.2d 219, 221 (3d Cir. 1963) (union's negotiation of mandatory retirement provision eliminating accrued seniority rights did not violate the Railway Labor Act); *McMullens* v. *Kansas, Oklahoma and Gulf Railroad*, 229 F.2d 50, 53-55 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956); *Goodin* v. *Clinchfield Railroad*, 135 F.Supp. 441, 448 (E.D. Tenn. 1954), *aff'd*, 229 F.2d 578 (6th Cir.), *cert. denied*, 351 U.S. 983 (1956).

tion in Employment (1965) ("Report"), which played a significant role in "the process of fact-finding and deliberation" leading to enactment of the ADEA. *EEOC* v. *Wyoming*, —— U.S. ——, 103 S.Ct. 1054, 1058 (1983). As part of its discussion of the effects of seniority systems on the hiring of older workers, the Report found that retirement results in the termination of seniority rights: "Although *retirement*, particularly early retirement, creates other types of problems, *it brings to an end those of seniority protection and related on the job claims.*" Report at 57-58 (emphasis added). The Report likewise informed Congress of the distinction between mandatory retirement policies, and alternative employment practices allowing transfer to less demanding positions. Report at 76, 88-89. This was the very distinction drawn by the 1977 House Committee Report, *supra*, p. 10, when it made clear that transfers were not required by the ADEA as an alternative to lawful mandatory retirement pursuant to 29 U.S.C. § 623(f)(1) or § 631(c).

"Retirement" is used in the 1978 amendments and throughout the legislative history to describe both what is to be prohibited [13] and what is to be permitted,[14] but its meaning does not change from one context to the other. The House Committee Report analyzed existing retirement practices in terms that unambiguously equated mandatory retirement with the termination of employment. H.R. Rep. at 2, 9-11. The Senate Committee Report, in relation to amending § 4(f)(2), likewise recognized that "*forced retirement extinguishes an individual's right to employment. . . .*" S. Rep. at 10, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, 504, 513 (emphasis added). The references in the Senate amendment and the Com-

[13] *See* Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978); 29 U.S.C. § 623(f)(2), § 631(a).

[14] *See* Pub. L. No. 95-256, § 3(a), 92 Stat. 189-190 (1978); 29 U.S.C. § 631(c). The exemption for tenured faculty was repealed as of July 1, 1982, Pub. L. No. 95-256, § 3(b)(3), 92 Stat. 190 (1978).

mittee Reports, *supra*, pp. 9, 10, 13, to "mandatory retirement" as authorized by § 4(f)(1) have the same meaning that "retirement" has in these discussions concerning reasons for eliminating mandatory retirement in the context of amending § 4(f)(2).

The legislative history of the ADEA offers no support for the position expressed by the court below that Congress permitted mandatory retirement from a job subject to a BFOQ only where younger employees are terminated whenever they could no longer work in a particular job. *See* A-31. There are various situations in which an employee can no longer work in a particular position (temporary or permanent disability, inadequate performance, changed job requirements, temporary reduction in the workforce, permanent elimination of jobs), and a wide range of possible responses to each of these situations (paid or unpaid leave, layoff, lateral transfer, displacement of other employees, waiting lists, redesign of job requirements, priority rights to available or future vacancies, retraining, termination, part-time work). The position expressed by plaintiffs invites this Court to speculate that Congress was unaware of any of these employment practices or that, if it was aware, it simply neglected to make the distinction adopted by the court below. However, Congress enacted and discussed § 4(f)(1) in broad terms applicable across the entire spectrum of employers subject to the ADEA.

As demonstrated in the amendment to § 4(f)(2), Congress in 1978 was concerned with, and knew how to prohibit, the practice of mandatory retirement pursuant to employee benefit plans. With equal ease, Congress, had it chosen, could have prohibited reliance on a BFOQ to require retirement under § 4(f)(1). Congress could also have amended § 4(f)(1) to preclude mandatory retirement under a BFOQ where transfers or other accommodations have been made available to other employees. Rather, Congress expressed its approval of mandatory

"retirement" at an age which is a BFOQ, and made it clear that alternative policies were not required by the ADEA.

B. The Plain Meaning of § 4(f)(1), as Buttressed by the Legislative History of the ADEA, Authorizes the Mandatory Retirement of Pilots Disqualified by the FAA Age 60 Rule.

In matters of statutory construction, "it is appropriate to begin with the language of the statute itself." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 91 (1981). It is equally appropriate "to begin with the language of the statute" in construing statutory limitations to remedial legislation. *See Kosak* v. *United States*, —— U.S. ——, 104 S.Ct. 1519, 1523-1524 (1984); *INS* v. *Phinpathya*, —— U.S. ——, 104 S.Ct. 584, 589 (1984); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982).

> This Court has noted on numerous occasions that "in all cases involving statutory construction, 'our starting point must be the language employed by Congress,' . . . and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'"

INS v. *Phinpathya*, 104 S.Ct. at 589, *quoting American Tobacco Co.* v. *Patterson*, 456 U.S. at 68.

The language in § 4(f)(1), "to take any action otherwise prohibited . . . where age is a BFOQ," plainly encompasses the "action" of retiring an employee disqualified by an age-based BFOQ. *Cf. United States* v. *Rodgers*, —— U.S. ——, 52 U.S.L.W. 4510, 4511 (U.S. May 1, 1984) (prohibition of false statements with respect to "any matter" is "sweeping language"). Indeed, even the EEOC has acknowledged that "[i]f age is a 'bona fide occupational qualification,' [an employer] is free to impose a mandatory retirement age . . . ."[10]

---

[10] *Brief of Appellant EEOC*, at 13-14, *EEOC* v. *Wyoming*, —— U.S. ——, 103 S.Ct. 1054 (1984). *See* 103 S.Ct. at 1071 (Burger, C.J., dissenting).

Where the statute is unambiguous, the plain meaning of the statutory language must be applied. *See INS* v. *Phinpathya*, 104 S.Ct. at 589 (remedial provision applicable to an alien "who has been physically present in the United States for a continuous period of not less than seven years" should be literally applied, since "the ordinary meaning of these words does not readily admit of any 'exception[s] . . . .'"); *Potomac Electric Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 274 (1980) ("Nor are we free to read the subsequent words 'all *other* cases' as though they described 'all *of* the foregoing' as well; the use of the word 'other' forecloses that reading."). *See also Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 173 (1978). "[T]o take any action otherwise prohibited . . . where age is a [BFOQ]" must be read to authorize mandatory retirement at an age which is a BFOQ, since "[t]he language . . . [of the statute] is clear and admits of but one reasonable interpretation." *Dickman* v. *Commissioner*, —— U.S. ——, 104 S.Ct. 1086, 1089 (1984).

The court below inverted this procedure, and used what it perceived to be the purposes of the ADEA and § 4(f)(1) to define the meaning of the statutory language. A-28 - A-29. This Court requires greater deference to the Congressional choices embodied in statutory language. *See Mohasco Corp.* v. *Silver*, 447 U.S. 807, 818 (1980) (holding that 300 day filing limit under Title VII must be read literally, and rejecting the view of the Second Circuit that "a literal reading did not give sufficient weight to the overriding purpose of the Act."). *See also American Tobacco Co.* v. *Patterson*, 456 U.S. at 68.

The Second Circuit erroneously reasoned that the plain meaning of "take any action otherwise prohibited" is not applicable if it would result in an "expansive reading of

[29 U.S.C.] § 623(f)(1) . . . that would swallow the Act." A-29:

> Under ALPA's interpretation, for example, a company could lawfully provide fewer retirement benefits to captains retiring at age 60 than to other retiring employees, simply because the position of captain is subject to an age 60 BFOQ.

Id. This Court has squarely rejected using extreme hypothetical examples to justify departing from the statutory language where the ordinary meaning of that language applies to the case before the court. *Dickman* v. *Commissioner*, 104 S.Ct. at 1093;[18] *Potomac Electric Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U.S. at 284.

Moreover, the court below failed to give the differences between § 4(f)(1) and the other sections of § 4(f) the decisive weight which they deserve. The decision acknowledged that "[29 U.S.C.] § 623(f)(2), unlike [29 U.S.C.] § 623(f)(1), contains an explicit prohibition of involuntary retirement on the basis of age." A-27, but considered

---

[18] In *Dickman* v. *Commissioner*, petitioners challenged a construction of gift tax statutes to include interest-free demand loans as taxable gifts on the grounds, *inter alia*, that "[c]arried to its logical extreme . . . . [this construction] would elevate to the status of taxable gifts such commonplace transactions as a loan of the proverbial cup of sugar to a neighbor or a loan of lunch money to a colleague." 104 S.Ct. at 1090. The Court found this "'parade of horribles'" to be unconvincing for two reasons, both of which apply to the Second Circuit's hypothetical. First, "[w]hen the government levies a gift tax on routine neighborly or familial gifts, there will be time enough to deal with such a case." *Id.* Second, the Court found that other statutory provisions would make the occurrence of these events extraordinarily unlikely. *Id.* As the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1053(a), provides that "an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age," it is equally unlikely that captains retiring at age 60 would be subject to age-based reductions in accrued pension benefits.

the absence of any limiting proviso in § 4(f)(1) to be unimportant. However, in *INS* v. *Phinpathya*, this Court considered the absence of any express limitation in § 244 (a)(1) of the Immigration and Nationality Act to be highly significant where Congress had provided such a limitation in former § 301(b) of the statute.[17] The court below also ignored the differences between the broad language of § 4(f)(1), "to take any action otherwise prohibited," and the language of § 4(f)(2) and § 4(f)(3) exempting specific employment practices. As this Court recently emphasized in *Kosak* v. *United States*, 104 S.Ct. at 1524, the use of general language in a limitation, where other limitations in the statute are stated with greater specificity, demonstrates "[t]he absence of any analogous desire to limit the reach of the [general] statutory exception . . . ."

The "plain language of the Act buttressed by its legislative history" is dispositive of its meaning. *Tennessee Valley Authority* v. *Hill*, 437 U.S. at 187. *See Dickman* v. *Commissioner*, 104 S.Ct. at 1089. *See also Bell* v. *New Jersey and Pennsylvania*, —— U.S. ——, 103 S.Ct. 2187, 2197 (1983). As demonstrated above, the House Committee Report, the Senate Committee Report, the Conference Committee Report, and Congressional debates demonstrate that Congress intended to authorize mandatory "retirement" at an age which is BFOQ. Requiring a captain disqualified by the FAA Age 60 Rule to retire at age 60 is "to take any action otherwise prohibited under [§ 4(a) of the ADEA] . . . where age is a [BFOQ]" within the plain meaning of § 4(f)(1); to engage in "mandatory retirement or other employment practices where age is a [BFOQ] . . ."[18] is within the scope of the activities which Congress expressly identified as exempt in the course of amending the ADEA in 1978.

[17] "The deliberate omission of a similar moderating provision in [this statute] compels the conclusion that Congress meant this 'continuous physical presence' requirement to be administered as written." *INS* v. *Phinpathya*, 104 S.Ct. at 589.

[18] H.R. Rep. at 12.

Ultimately, the court below simply declined to believe that Congress really meant what it said, and substituted its own judgment concerning the appropriate scope of § 4(f)(1) for the decisions made by Congress in 1978 in authorizing the continued use of certain mandatory retirement practices. The decisions of this Court squarely reject this or any other form of "judicial legislation." *See Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980) ("balancing of competing values and interests . . . in our democratic system is the business of elected representatives," not the courts); *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 626 (1978) ("[W]e have no authority to substitute our views for those expressed by Congress in a duly enacted statute.") *See also Heckler* v. *Mathews*, —— U.S. ——, 104 S.Ct. 1387, 1396 (1984); *Tennessee Valley Authority* v. *Hill*, 437 U.S. at 194.

The Second Circuit not only ignored Congress' express intent that § 4(f)(1) should continue to authorize mandatory retirement at an age which is a BFOQ, but also read a limitation into § 4(f)(1) that Congress did not enact: making mandatory retirement of employees subject to a BFOQ unlawful when an employer accommodates other employees who are no longer able to work in a particular job. Yet, there is nothing in the language of § 4(f)(1) or, as demonstrated above, *supra* at pp. 9-13, in the legislative history of the ADEA to justify this distinction. In *American Tobacco Co.* v. *Patterson*, this Court rejected a proposed distinction between the "application" and "adoption" of seniority systems, since "[t]hat distinction would require reading § 703(h) [of Title VII] as though the reference to a seniority system were followed by the words 'adopted prior to the effective date of this section.' But the section contains no such limitations." 456 U.S. at 69. There is similarly no basis to read § 4(f)(1) as if it contained the limitation imposed by the court below on taking "any action" where age is a BFOQ.

Properly construed in accordance with its plain language, as buttressed by the legislative history of the ADEA, § 4(f)(1) authorizes the retirement of airline captains disqualified by the FAA Age 60 Rule at age 60.

CONCLUSION

For all the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be vacated and the judgment of the United States District Court for the Southern District of New York should be reinstated.

Respectfully submitted,

MICHAEL E. ABRAM
330 West 42nd Street
New York, New York 10036
(212) 563-4100
Counsel of Record for Air Line Pilots Association, International

JAY P. LEVY-WARREN
ANN E. O'SHEA
COHEN, WEISS and SIMON
Of Counsel

May 31, 1984

AMICUS CURIAE

BRIEF

MOTION FILED

MAY 31 1984

Nos. 83-997, 83-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

STEPHEN A. BOKAT
Counsel of Record
ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the amicus curiae Chamber of Commerce of the United States of America

WILSON - EPES PRINTING CO., INC. - 783-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-997, 83-1325

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States moves for leave to file the attached brief *amicus curiae* in support of the petitioner, Trans World Airlines, Inc. We file this motion pursuant to Supreme Court Rule 36.3 because the individual respondents, Harold H. Thurston,

Christopher J. Clark and C. A. Parkhill declined to consent to the filing of the *amicus* brief.

The Chamber of Commerce of the United States ("Chamber") is the largest federation of business and professional organizations in the United States. Chamber membership currently exceeds 200,000, and includes over 195,000 corporations, partnerships and proprietorships as well as over 3,900 trade associations, and state and local chambers of commerce. The Chamber regularly represents the interests of its members in litigation of issues of national concern to the American business community, and, in fact, filed an *amicus curiae* brief in support of the Petition for Certiorari in case No. 83-997.[1]

The issues in this case are of particular interest to Chamber members and to all American companies regulated by the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 (1982). Many of the Chamber's member companies employ workers within the class of employees protected by the ADEA. The Chamber, therefore, is concerned that employers who make non-age related accommodations for employees need not also be required to make age-related accommodations; that the standard of liability under the ADEA not be construed so broadly as to eliminate the requirement of specific intent to establish a "willful" violation of the ADEA; and that labor unions which violate the ADEA should be liable for monetary relief.

As the principal voice of the American business community, the Chamber is well-suited to present the broad interest of business in this case. The Chamber believes it is important for this Court to recognize the significance of these issues to business as a whole and, therefore, respectfully requests leave to file the attached brief.

Respectfully submitted,

STEPHEN A. BOKAT
Counsel of Record
ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the amicus curiae Chamber of Commerce of the United States of America

---

[1] *See, e.g., Environmental Protection Agency* v. *Natural Resources Defense Council, Inc.*, *cert. granted*, 52 U.S.L.W. 3791 (U.S. May 1, 1984); *Brown* v. *U.S. Postal Service*, —— U.S. ——, 74 L.Ed. 2d 402 (1983); *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981).

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
INTRODUCTION	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE HOLDING OF THE MAJORITY BELOW IMPOSES BURDENS ON EMPLOYERS FAR BEYOND ANY INTENDED BY CONGRESS WHEN IT PASSED THE ADEA	4
II. THE DECISION BELOW FAILS TO DISTINGUISH WILLFUL FROM NON-WILLFUL CONDUCT AND ALLOWS FOR AUTOMATIC AWARDS OF DOUBLE DAMAGES	6
A. The Decision Below Ignores The Plain Meaning Of "Willful" And Defeats Congressional Intent To Establish A Two-Tiered Level Of Liability Under the ADEA	6
B. A Specific Intent Standard Avoids Automatic Awards Of Double Damages And Is Consistent With Congressional Intent	9
III. LABOR ORGANIZATIONS THAT VIOLATE THE ADEA SHOULD BE LIABLE FOR MONETARY RELIEF	10
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Allen v. *Amalgamated Transit Union, Local 788*, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977) 13

Bowen v. *U.S. Postal Service*, —— U.S. ——, 74 L.Ed.2d 402 (1983) 12, 13

Cova v. *Coca-Cola Bottling Co.*, 575 F.2d 958 (8th Cir. 1978) 6

Donnell v. *General Motors Corp.*, 567 F.2d 1292 (8th Cir. 1978) 13

EEOC v. *Air Line Pilots Association*, 489 F. Supp. 1003 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981) 12

Furnco Construction Corp. v. *Waters*, 438 U.S. 567 (1978) 5

Loeb v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979) 3, 9

Neuman v. *Northwest Airlines*, 28 FEP 1488 (N.D. Ill. 1982) 12

Parcinski v. *Outlet Co.*, 673 F.2d 34 (2d Cir. 1982), *cert. denied*, —— U.S. ——, 75 L.Ed.2d 950 (1983) 6

Pirone v. *Homes Ins. Co.*, 559 F. Supp. 306 (S.D. N.Y. 1983) 6

Radio Officers' Union v. *NLRB*, 347 U.S. 17 (1953) 13

Reilly v. *Friedman's Express, Inc.*, 556 F. Supp. 618 (M.D. Pa. 1983) 6

Rogers v. *International Paper Co.*, 256 F.2d 722 (8th Cir. 1975) 13

Sears v. *Atkinson, Topeka and Santa Fe Railway*, 645 F.2d 1365 (10th Cir. 1981), *cert. denied*, 465 U.S. 964 (1982) 13

Syvock v. *Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149 (7th Cir. 1981) 3, 9

United Airlines v. *McMann*, 434 U.S. 192 (1977) 2

Vaca v. *Sipes*, 386 U.S. 171 (1967) 13

STATUTES

Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 (1982) ..... 2, passim

TABLE OF AUTHORITIES—Continued

Page

Civil Rights Acts of 1964, 41 U.S.C. § 2000e (1981) 13

National Labor Relations Act

29 U.S.C. § 141 (1972) 13

29 U.S.C. § 158(b)(2) (1972) 13

Railway Labor Act, 45 U.S.C. § 151 (1972) 2

14 C.F.R. § 121.383 2

MISCELLANEOUS

Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702 (1980) 13

113 Cong. Rec. 7076 (daily ed. March 16, 1967) 8

123 Cong. Rec. H. 9348 (daily ed. Sept. 13, 1977) 11, 12

124 Cong. Rec. H. 9970 (daily ed. Sept. 23, 1977) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-997, 83-1325

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,
v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion for Leave to File Brief Amicus Curiae for a statement of its interest in this proceeding.

INTRODUCTION

This case arises out of the Federal Aviation Administration's ("FAA") requirement that commercial airline pilots cease serving in that capacity after age 60.[1] 14 C.F.R. § 121.383. Prior to the 1978 amendments to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 (1982), Trans World Airlines, Inc. ("TWA"), like the rest of the airline industry, required all cockpit crewmembers to retire at age 60. This was consistent with the ADEA.[2]

Following passage of the 1978 amendments to the ADEA, TWA determined that changes would have to be made in order to comply with the statute. (J.A. 1046-47, 1050-51). Over the objections of the Air Line Pilots Association ("ALPA"), TWA instituted a new policy providing that any cockpit crewmember in flight engineer status at age 60 could not be compelled to retire. (J.A. 425). Transfers from pilot to flight engineer status were to be governed by the collective bargaining agreement (J.A. 425).

Soon thereafter, TWA was sued in separate actions both by ALPA and by a group of pilots. ALPA claimed that allowing anyone to work in the cockpit after age 60 violated the collective bargaining agreement and the Railway Labor Act, 45 U.S.C. 151 (1972) (J.A. 108-15).[3] The plaintiffs in the instant case were pilots who had been retired at age 60 when there were no flight engineer vacancies available prior to their 60th birthdays. It was established that 83% of the pilots seeking to downgrade to flight engineer positions at age 60 have been successful in doing so. (A-61 n.8).

---

[1] It is not the Chamber's intention to provide a detailed restatement of the facts or the proceedings below. For such a recitation the Chamber respectfully refers the Court to petitioner, Trans World Airlines' Statement of the Case.

[2] *See United Airlines* v. *McMann*, 434 U.S. 192 (1977).

[3] This suit was ultimately dismissed by the district court (A-50-54), and that ruling was affirmed on appeal. (A-13-21).

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Second Circuit held in the instant case that TWA violated the ADEA by requiring pilots approaching age 60 to bid for positions as flight engineers, although a similar bidding requirement was not imposed on pilots becoming flight engineers because of health conditions. That holding ignores several key factors: Pilots downgrading because of health conditions were treated the same regardless of their age; only two pilots ever downgraded due to health considerations; and 83% of age 60 pilots were able to obtain positions as flight engineers through the seniority system's bidding procedures.

The duty of accommodation imposed by the Second Circuit is far in excess of any intended by Congress when it amended the ADEA in 1978. The statute and its legislative history are clear that employers are under no duty to provide special treatment to employees between ages 40 and 70.

Even if this Court finds that TWA violated the ADEA, it should reject the Second Circuit's conclusion that the violation was willful. The record is clear that TWA took the actions giving rise to this case in a good faith effort to comply with the 1978 amendments to the ADEA. The Second Circuit's conclusion appears to make any violation willful if it is not accidental or negligent. The Chamber believes this conclusion is inconsistent with both the plain meaning of the term "willful" and Congressional intent to establish two levels of liability under the Act. The Chamber urges this Court to adopt a specific intent standard of willfulness such as that adopted by the U.S. Court of Appeals for the First Circuit in *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1979), and the Seventh Circuit in *Syvock* v. *Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149 (1981).

The Chamber additionally urges this Court to reject the Second Circuit's ruling that under the ADEA unions are exempt from monetary liability. The Second Circuit

originally imposed such liability, but then, without explanation, it amended its opinion to delete the imposition of monetary liability. Imposition of monetary liability on labor organizations is consistent with the ADEA itself, as well as its legislative history. Moreover, it is consistent with the practice under other labor statutes.

ARGUMENT

I. THE HOLDING OF THE MAJORITY BELOW IMPOSES BURDENS ON EMPLOYERS FAR BEYOND ANY INTENDED BY CONGRESS WHEN IT PASSED THE ADEA.

A majority of the court below reversed the district court's dismissal of the case and held that TWA had violated the ADEA by requiring that pilots approaching age 60 bid for positions as flight engineers prior to their 60th birthdays and retire if no position was available. The majority's holding is based on its view that TWA "routinely accommodates" pilots downgrading for non-age reasons. (A-30). In this regard, the majority noted that TWA captains who were unable to remain in that position due to a medical condition could downgrade to a flight engineer's position "without being required to bid for the position." (A-10).

What the majority mistakenly ignores, however, is that any of the plaintiffs, prior to turning age 60, could downgrade to a flight engineer's position in the same manner as a younger pilot if a medical condition had necessitated them doing so. As Judge Van Graafeiland notes in dissent, the majority's finding of discrimination based on a comparison of the procedures for downgrading because of the FAA age bar, and the procedure for downgrading because of an adverse medical condition, is "like comparing apples with oranges." (A-35 to A-36).[4]

[4] In stating why he felt this was an unfair comparison, Judge Van Graafeiland noted:

> "A pilot does not know in advance that he is going to break his leg or that company economics will eliminate the job he is performing. However, a pilot knows the exact date on which he will become 60 years of age and that after that date, FAA regulations will no longer permit him to work as a pilot." (A-36).

The Second Circuit's finding of discrimination based on the comparison of the different downgrading procedures is made all the more strange in view of the fact that no more than two pilots have reverted to flight engineer positions because of medical conditions (J.A. 968), and that 83% of pilots attempting to downgrade in order to continue working after age 60 have been successful in that regard. Rather than being based on a rational interpretation of the ADEA, the majority's conclusions appear to be based at least in part on its dislike of the FAA's age 60 rule. This is apparent from the majority's gratuitous observation that the FAA does not apply the age 60 rule to its own pilots. (A-18). The validity of the FAA requirement, however, is not disputed here. The simple fact is that TWA, like all major airlines, must comply with the rule, and TWA's actions here were taken in a good faith effort to comply with the rule, the 1978 amendments to the ADEA, and the working agreement.

The Chamber submits that TWA's accommodation was reasonable under the circumstances. The rationale of the Fifth Circuit in rejecting a claim of pregnancy discrimination under Title VII of the Civil Rights Act of 1964 is relevant here. As the Supreme Court cautioned in *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 578 (1978), courts are "generally less competent than employers to restructure business practices."

In sum, the Chamber believes the Second Circuit has imposed a duty of accommodation far in excess of anything contemplated by Congress when it amended the ADEA. TWA has posited a valid, non-discriminatory business reason for the requirements imposed on pilots approaching age 60. The majority's order, in essence, requires TWA to create positions where none exists. The

ADEA does not require such special treatment. As Judge Van Graafeiland, the dissenter here, stated for the majority in an earlier Second Circuit opinion:

> The ADEA does not require an employer to accord special treatment to employees over forty years of age . . . . It requires, instead, that an employee's age be treated in a neutral fashion, neither facilitating nor hindering advancement, demotion, or discharge.

Parcinski v. *Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), *cert. denied*, —— U.S. ———, 75 L.Ed. 2d 950 (1983). *Accord, e.g., Cova* v. *Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (8th Cir. 1978) ("The act does not require that advanced age and substantial length of service entitle employees to special favorable consideration"); *Pirone* v. *Home Ins. Co.*, 559 F. Supp. 306, 311 (S.D.N.Y. 1983) ("The act does not require that employees 40 years of age or older be given a preference"); *Reilly* v. *Friedman's Express, Inc.*, 556 F. Supp. 618, 621 (M.D. Pa. 1983) (The ADEA "does not mandate special treatment be accorded those within the protected group").

II. THE DECISION BELOW FAILS TO DISTINGUISH WILLFUL FROM NON-WILLFUL CONDUCT AND ALLOWS FOR AUTOMATIC AWARDS OF DOUBLE DAMAGES.

A. The Decision Below Ignores The Plain Meaning Of "Willful" And Defeats Congressional Intent To Establish A Two-Tiered Level Of Liability Under The ADEA.

Section 7(b) of the ADEA authorizes the recovery of liquidated or double damages "*only* in cases of *willful* violations" of the Act. 29 U.S.C. § 626(b) (emphasis added). In the decision below, the Second Circuit broadly interprets the term "willful" and holds that in discriminatory treatment cases plaintiffs need not prove a specific intent to violate the ADEA. According to the Second

Circuit, "it is sufficient to establish that the employer either knew of or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." (A-33).

The Chamber is concerned that this broad standard for determining liability under the ADEA automatically makes "willful" all acts that are not accidental or negligent. Such a broad standard of "willfulness" is based on the faulty logic that "an employer's actions, if taken *because* of an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reason." (A-34) (emphasis in the original). According to this logic, a finding of willfulness would necessarily follow in every ADEA disparate treatment case. The Chamber believes that this result is inconsistent with both the plain meaning of the term "willful" and Congress' intent to establish two levels of liability under the Act.

The plain meaning of § 7(b) denotes two levels of liability under the ADEA. Under this two-tiered approach, double damages are recoverable only when discrimination is willful. Actual damages are the appropriate remedy for non-willful discrimination. The fact that Congress provided for special remedies in the case of willful violations implies that employees can recover for accidental and unintentional violations as well as for deliberate violations of the ADEA. Yet, under the standard applied by the majority below, there can be no unintentional or innocent reason for an employer's action if taken because of age. By failing to distinguish willful from non-willful conduct, the Second Circuit ignores the plain meaning of the term "willful" and defeats congressional intent to establish a two-tiered level of liability under the ADEA.

It is undisputed that TWA revised its retirement policy vis-a-vis flight engineers in an effort to comply with, not to avoid, the 1978 amendments to the ADEA. These amendments raised the mandatory retirement age from

60 to 70. TWA changed its retirement policy in response to these amendments so that "any cockpit crew member who [was] in a Flight Engineer status at age 60 may not be compelled to retire." (A-9). Rather than violate the law, TWA was attempting to conform its retirement policy with changes in the law. But instead of being commended for its efforts, TWA was sued both by ALPA for allowing anyone to serve in the cockpit beyond age 60 and by several TWA captains who had to retire at age 60 because there were no flight engineer vacancies. Furthermore, the majority below found TWA to be in willful violation of the Act even though it was sued by one group for going too far and by another group for not going far enough in its attempt to comply with the ADEA. That holding is particularly absurd when viewed in the light of the fact that 83% of the retiring pilots were able to obtain positions as flight engineers.

The Chamber believes that the Second Circuit's approach to liquidated damages is wrong because it automatically makes "willful" all discriminatory actions that are based on age and thereby defeats Congress' intent to establish two levels of liability under the ADEA. The legislative history of § 7(b) of the ADEA supports a two-tiered approach to finding liability under the ADEA. Senator Javits, a co-sponsor of the original 1967 statute, characterized the civil liquidated damages provision of the ADEA as a punitive counterpart to the criminal sanctions provision of the Fair Labor Standards Act.[8] A stricter view of the scienter standard for a willful violation therefore is consistent with legislative recognition of providing a more severe sanction for employers who willfully violate the ADEA.

---

[8] "... [T]he [FLSA's] criminal penalty in cases of willful violations has been eliminated and a double damage liability substituted. This will furnish an effective deterrent to willful violations and at the same time avoid difficult problems of proof which would arise under a criminal provision." 113 Cong. Rec. 7976. (daily ed. March 16, 1967) (emphasis in the original).

B. A Specific Intent Standard Avoids Automatic Awards Of Double Damages And Is Consistent With Congressional Intent.

According to the standard for willfulness adopted by the majority below, an employer may be liable for double damages even though he did not know his actions were illegal. The Chamber believes that this standard is unfair and urges this Court to adopt a specific intent standard similar to the one established by the First Circuit in *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1979) and Seventh Circuit in *Syvock* v. *Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149 (1981).

In *Loeb*, the First Circuit defined a violation of the ADEA as willful if "done voluntarily and intentionally and with the specific intent to do something the law forbids, that is to say, with bad purpose either to disobey or disregard the law." 600 F.2d at 1020 n.27, *quoting* E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.06, at 384 (3d ed. 1977). In *Syvock*, the Seventh Circuit held that "the standard of willfulness ... should focus on the defendant's state of mind at the time the alleged discriminatory act occurred" and "that a finding of willfulness should lie only if there is some showing as to the defendant's knowledge of the legality of his actions." 665 F.2d at 155. Both Circuits therefore look at the purpose of an employer's actions to determine whether it was willful.

The majority below, on the other hand, adopts a much lower standard for determining willfulness. The Second Circuit test allows a recovery of double damages whenever an employee can prove that "an employer's action ... [was] taken *because* of ... age ..." (A-34). This test allows for automatic awards of double damages and, consequently, is inconsistent with congressional intent to establish two levels of liability under the ADEA.

A specific intent standard for determining willfulness would eliminate automatic awards of double damages and be consistent with congressional intent. While Congress did not intend that liquidated damages be awarded for every violation of the ADEA, by providing for such damages Congress did not intend that they never be awarded. By requiring proof of the defendant's state of mind to establish a "willful" violation of the ADEA, this Court would strike an appropriate balance between these two countervailing concerns and ensure that an award of liquidated damages is an exceptional, rather than an automatic, remedy. The Chamber therefore urges this Court to adopt the strict, specific intent standard for "willful" violations of the ADEA, rather than the Second Circuit's standard which makes awards of double damages automatic in a disparate treatment case.

III. LABOR ORGANIZATIONS THAT VIOLATE THE ADEA SHOULD BE LIABLE FOR MONETARY RELIEF.

Assuming this Court finds that TWA and ALPA violated the ADEA, the Chamber believes there is strong support for the proposition that ALPA should share in the monetary liability. In fact, in its initial opinion, the Second Circuit held that the plaintiffs in this action could recover back pay from the union as well as from the employer. In this regard, the court originally held:

> [Plaintiffs] are entitled to recover back pay, an equitable remedy, against the union. *Equal Employment Opportunity Commission v. Air Line Pilots Association, Int'l.*, 489 F. Supp. 1003, 1008-10 (D. Minn. 1980) *rev'd. on other grounds*, 661 F.2d 90 (8th Cir. 1981). The union owes a duty to all its members, including its over-60 members, not to discriminate against them. See, *Steele* v. *Louisville & Nashville Railroad*, 323 U.S. 192 (1944). One of the purposes of a back pay award is to spur unions, as well as employers, to evaluate employment practices and eliminate unlawful discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975). (A-34-35).

Although petitions for rehearing were denied, the Second Circuit subsequently deleted those portions of its opinion where it imposed monetary liability on the union. (A-38-39). The Second Circuit provided absolutely no rationale for its action.

There is no question that the Second Circuit viewed the union as culpable. In this regard, the majority below specifically held that the union sought "to use the ADEA to cut off the right of the older flight engineers." (A-20). The court also said that the union "actively campaigned to persuade TWA to retain its age-60 retirement policy for all flight deck positions, opposed TWA's unilateral action to attempt partial compliance with the ADEA and induced TWA to impose further discriminatory restrictions on captains seeking to downbid to flight engineer status . . ." (A-32-33).

The Second Circuit's unexplained waiver of union liability for monetary relief contradicts the plain language of the statute. Section 4(c) of the ADEA, 29 U.S.C. § 623, makes it illegal for a union to take any action which adversely affects an employee because of his or her age. And the remedial provision of the statute, section 7(b), 29 U.S.C. § 626(b), provides in relevant part that "court[s] shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of the Act . . . ."

That Congress intended unions to be responsible for their actions is further buttressed by the legislative history of the 1978 amendments to the ADEA. For example, during consideration of the 1978 amendments, Congressman Findley stated:

> The AFL-CIO wants union leadership to keep mandatory retirement as an issue for negotiation during

> collective bargaining. Union leaders argue that because they represent a majority of the workers, mandatory retirement would therefore be a majority decision. But a majority should never be permitted to impose injustice on even a small minority. Unions cannot bargain away the rights of blacks or women —why older citizens?

123 Cong. Rec. H 9348 (daily ed. Sept. 13, 1977).

And, Congressman Hillis expressed agreement with an article he inserted in the hearing record from the newsletter of the American Association of Retired Persons which states in pertinent part:

> Myth: Unions should have the right to use a mandatory retirement age as a "bargaining chip" in collective bargaining with management.
>
> Reality: Unions are prohibited from discrimination on the basis of race, religion or sex and collective bargaining. Why should they be allowed to practice age discrimination by bargaining away a person's opportunity to earn a livelihood merely because of age? In recent months several unions—including the United Steelworkers of America—have made important strides toward flexible retirement policies for their members. We hope that their colleagues in organized labor will see the wisdom of this approach.

123 Cong. Rec. H 9970 (daily ed. Sept. 23, 1977).

It is incomprehensible that Congress would express this type of concern over union compliance with the ADEA, but not intend union liability for losses caused by its noncompliance. *See EEOC* v. *ALPA*, 489 F.Supp. at 1009.[6] As recently as last term, this Court recognized that if unions are not made to share in the monetary liability resulting from their illegal acts, they will have little motivation to comply with their statutory respon-

[6] *Contra Neuman* v. *Northwest Airlines*, 28 FEP Cases 1488 (N.D. Ill. 1982).

sibilities. *Bowen* v. *U.S. Postal Service*, —— U.S. ——, 74 L. Ed. 2d at 416 (1983). In *Bowen*, a fair representation case, this Court stated: "In the absence of damages apportionment where the default of both parties contributed to the employee's injury, incentives to comply with the grievance procedure will be diminished."[7]

Back pay awards against unions have also been consistently imposed under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 (1972). For example, unions which violate § 8(b)(2) of the NLRA by causing an employer to discriminate against employees by encouraging or discouraging union membership have been held by the National Labor Relations Board to be entirely liable for the back pay when it was necessary to do so in order to make the injured employees whole. 29 U.S.C. § 158(b)(2). In *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 54-55 (1953), this Court emphatically rejected the argument that it would not effectuate NLRA policies to require the union "to reimburse back pay if the employer is not made to share this burden. . . ."

Imposition of monetary liability on the unions under the ADEA is also consistent with the practice under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1981). Courts uniformly have held under Title VII that unions must share monetary liability with employers.[8] The same result should obtain under the ADEA.

[7] *Bowen* was a refinement of this Court's holding in *Vaca* v. *Sipes*, 386 U.S. 171, 197 (1967), that the "governing principle . . . is to apportion liability between the employer and the union according to the damage caused by the fault of each."

[8] *See, e.g., Sears* v. *Atkinson, Topeka, and Santa Fe Railway*, 645 F.2d 1365, 1374-77 (10th Cir. 1981), *cert. denied* 456 U.S. 964 (1982); *Donnell* v. *General Motors Corp.*, 567 F.2d 1292, 1300 (8th Cir. 1978); *Allen* v. *Amalgamated Transit Union, Local 788*, 554 F.2d 876, 881 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977); *Rogers* v. *International Paper Co.*, 526 F.2d 722, 723 (8th Cir. 1975). *See also*, Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702, 706 (1980).

For these reasons, the Chamber believes that imposition of monetary liability is consistent with the ADEA, other labor statutes, and our national labor policy. Moreover, there is no inequity in imposing monetary liability on a party found to be directly responsible for a statutory violation where (1) the statute expressly imposes a duty to comply, and (2) the statute provides that the court may "grant such legal or equitable relief as may be appropriate to effectuate the purposes of the Act . . ." 29 U.S.C. § 626(b).

CONCLUSION

For the foregoing reasons, the Chamber of Commerce respectfully urges this Court to find that TWA did not violate the ADEA. If this Court should find TWA in violation of the ADEA, the Chamber respectfully urges that it find that the violation was not willful, and that the union must share in the monetary liability arising from the violation.

Respectfully submitted,

STEPHEN A. BOKAT
Counsel of Record
ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the amicus curiae Chamber of Commerce of the United States of America

RESPONDENT'S

BRIEF

Office Supreme Court, U.S.
FILED
JUL 6 1984
ALEXANDER L. STEVAS,
CLERK

Nos. 83-997, 83-1225

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND TRANS WORLD AIRLINES, INC.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL Respondent in No. 83-997

MICHAEL E. ABRAM
330 West 42nd Street
New York, New York 10036
(212) 563-4100
Counsel of Record for Air Line Pilots Association, International

JAY P. LEVY-WARREN
ANN E. O'SHEA
COHEN, WEISS and SIMON
Of Counsel

WILSON - EPES PRINTING CO., INC. - 783-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a defendant-employer may assert the EEOC's claim for damages under the Age Discrimination in Employment Act ("ADEA") against a defendant-union, notwithstanding that the EEOC has not sought review of the judgment that the defendant-union is not liable for damages, has opposed the defendant-employer's assertion of the EEOC's damages claim, and has stated that it will seek complete recovery of damages from the defendant-employer?

2. Whether a joint violator of the ADEA has a right to shift a portion of the damages which may be obtained against it to a codefendant union (*i.e.*, secure contribution) where the EEOC no longer seeks damages against the union; if so, whether the Court should consider that claim where it was asserted for the first time by petition for certiorari?

3. Whether, in the absence of a damages remedy against labor unions in the comprehensive remedial scheme of the Fair Labor Standards Act ("FLSA") as incorporated in the ADEA, the EEOC may secure monetary relief against a defendant-union for jointly violating the ADEA with an employer?

4. Whether the EEOC may secure liquidated damages against a union for violating the ADEA?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
PRELIMINARY STATEMENT	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. TWA's Retirement Practices	2
B. Decision of the Court Below	4
C. Position of the Parties before this Court	5
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. TWA HAS NO RIGHT TO ASSERT THE EEOC'S CLAIM FOR DAMAGES OR OTHERWISE COMPEL ALPA TO SHARE ITS FINANCIAL RESPONSIBILITY	7
A. The EEOC's Claim for Damages against ALPA Is Not Properly before the Court	7
B. TWA Has No Right to Compel ALPA to Share Responsibility for Damages under the ADEA	9
1. TWA's belated effort to shift damages to ALPA should not be considered	9
2. TWA has no right to shift damages	10
II. THE ADEA DOES NOT AUTHORIZE MONETARY RELIEF AGAINST LABOR ORGANIZATIONS	16

TABLE OF CONTENTS—Continued

	Page
A. Congress Fully Incorporated into the ADEA the Remedial Scheme of the FLSA with Respect to the Recovery of Lost Wages and Benefits	16
B. The FLSA Does Not Provide for Recovery of Damages Caused by Union Violations of § 15 of the FLSA	19
1. The EEOC has no right of action against ALPA under § 16(c)	20
a. FLSA § 16(c) must be construed as incorporated in the ADEA in 1967	21
b. Section 16(c) does not otherwise authorize recovery of damages against labor organizations	22
2. Section 17 does not provide remedy to recover money damages against unions which enter into collective bargaining agreements embodying unlawful employment practices	26
C. Section 7(b) of the ADEA Does Not Provide Monetary Remedies in Addition to those Expressly Authorized by the FLSA	30
D. The Policy Considerations Offered by TWA Do Not Justify Judicial Fashioning of Additional ADEA Remedies against Labor Organizations	35
CONCLUSION	42

TABLE OF AUTHORITIES

CASES

	Page
Adickes v. *S. H. Kress and Co.*, 398 U.S. 144 (1970)	9-10
Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975)	38
Albert Miller & Co. v. *Wilkins*, 209 F. 582 (7th Cir. 1913)	15
Altman v. *Stevens Fashion Fabrics*, 441 F. Supp. 1318 (N.D. Cal. 1977)	15
Anderson v. *Local 3, International Brotherhood of Electrical Workers*, 582 F. Supp. 627 (S.D. N.Y.), *appeal docketed*, No. 84-7384 (2d Cir. 1984)	14
Atkinson v. *Owens-Illinois Glass Co.*, 10 Fair Empl. Prac. Cases (BNA) 710 (N.D. Ga. 1975)	14
Bale v. *United Steelworkers*, 6 Fair Empl. Prac. Cases (BNA) 824 (W.D. Pa. 1973)	41
Baldwin County Welcome Center v. *Brown*, —— U.S. ——, 104 S.Ct. 1723 (1984)	13
Barrentine v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981)	37, 39
Beebe v. *Highland Tank and Manufacturing Co.*, 373 F.2d 886 (3d Cir. 1967), *cert. denied*, 388 U.S. 911 (1967)	8, 15
Bonner v. *Elizabeth Arden, Inc.*, 177 F.2d 703 (2d Cir. 1949)	26
Bowe v. *Judson C. Burns, Inc.*, 137 F.2d 37 (3d Cir. 1943)	23, 24, 26
Brennan v. *Arnheim & Neely, Inc.*, 410 U.S. 512 (1973)	8
Brennan v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057 (S.D.N.Y. 1975)	28, 29
Brennan v. *Whatley*, 432 F. Supp. 465 (E.D. Tex. 1977)	15
Brin v. *Bigsby and Kruthers*, 19 Fair Empl. Prac. Cases (BNA) 415 (N.D. Ill. 1979)	35
Britton v. *Grace Line, Inc.*, 214 F. Supp. 295 (S.D. N.Y. 1962)	26

TABLE OF AUTHORITIES—Continued

	Page
Brooklyn Savings Bank v. *O'Neil*, 324 U.S. 697 (1945)	28
Buchholtz v. *Swift & Co.*, 609 F.2d 317 (1979)	39
Burns v. *Equitable Life Assurance Society*, 696 F.2d 21 (2d Cir. 1982), *cert. denied*, —— U.S. ——, 104 S.Ct. 336 (1983)	17, 18
California v. *Taylor*, 353 U.S. 553 (1957)	10
Capital Cities Cable, Inc. v. *Crisp*, —— U.S. ——, 52 U.S.L.W. 4803 (U.S. June 19, 1984)	8, 10
Chaudois v. *ALPA*, 6 Fair Empl. Prac. Cases (BNA) 107 (D.D.C. 1973)	41
Cleary v. *United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984)	18
Costino v. *Baltimore & Annapolis Railroad*, 178 F.2d 521 (4th Cir. 1949)	15
Cook v. *Mountain States Telephone and Telegraph Co.*, 397 F. Supp. 1217 (D. Ariz. 1975)	24, 26
Corsicana National Bank v. *Johnson*, 251 U.S. 68 (1919)	15
Dean v. *American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978)	18, 33
de Loraine v. *MEBA Pension Trust*, 499 F.2d 49 (2d Cir. 1974)	41
Denicola v. *G.C. Murphy Co.*, 562 F.2d 889 (3d Cir. 1977)	24, 26, 29
Diamond v. *Chakrabarty*, 447 U.S. 303 (1980)	38
Director, Office of Workers' Compensation Programs v. *Black Diamond Coal Mining Co.*, 598 F.2d 945 (5th Cir. 1979)	31
Director, Office of Workers' Compensation Programs v. *Robertson*, 625 F.2d 873 (9th Cir. 1980)	31
Donovan v. *Agnew*, 712 F.2d 1509 (1st Cir. 1983)	15
Donovan v. *Brown Equipment and Service Tools, Inc.*, 666 F.2d 148 (5th Cir. 1982)	27, 30
Donovan v. *Mazzim Industries, Inc.*, 552 F. Supp. 1024 (D. Mass. 1982)	15

TABLE OF AUTHORITIES—Continued

	Page
Donovan v. *Sabine Irrigation Co.*, 695 F.2d 190 (5th Cir.), *cert. denied*, —— U.S. ——, 103 S.Ct. 3537 (1983)	15
Donovan v. *Sovereign Security, Ltd.*, 726 F.2d 55 (2d Cir. 1984)	27
Dunlop v. *Beloit College*, 411 F. Supp. 398 (W.D. Wis. 1976)	28, 29
EEOC v. *Air Line Pilots Association, International*, 489 F. Supp. 1003 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981)	16, 33
EEOC v. *Brown & Root, Inc.*, 725 F.2d 348 (5th Cir. 1984)	18
EEOC v. *Chrysler Corp.*, 546 F. Supp. 54 (E.D. Mich.), *aff'd on other grounds*, 683 F.2d 146 (6th Cir. 1982)	22
EEOC v. *Corry Jamestown Corp.*, 719 F.2d 1219 (3d Cir. 1983)	18, 23
EEOC v. *Ferris State College*, 493 F. Supp. 707 (W.D. Mich. 1980)	28, 29
EEOC v. *Gilbarco, Inc.*, 615 F.2d 985 (4th Cir. 1980)	20, 30
EEOC v. *Wyoming*, —— U.S. ——, 103 S.Ct. 1054 (1983)	40
Fiedler v. *Indianhead Truck Line, Inc.*, 670 F.2d 806 (8th Cir. 1982)	17-18, 33
Foman v. *Davis*, 371 U.S. 178 (1962)	10
Germann v. *Pekow*, 531 F. Supp. 355 (N.D. Ill. 1981)	14
Gibson v. *Mohawk Rubber Co.*, 695 F.2d 1093 (8th Cir. 1982)	17
Goldberg v. *Dix Box Co.*, 45 Lab. Cas. (CCH) ¶ 31,325 (S.D. Cal. 1962)	15
Goodman v. *Heublein, Inc.*, 645 F.2d 127 (2d Cir. 1981)	22
Greenberg v. *Arsenal Bldg. Corp.*, 50 F. Supp. 700 (S.D.N.Y. 1943), *modified on other grounds and otherwise aff'd*, 144 F.2d 292 (2d Cir. 1944), *aff'd in relevant part sub nom. Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945)	15

TABLE OF AUTHORITIES—Continued

	Page
Hamilton Trust Co. v. *Cornucopia Mines Co.*, 223 F. 494 (9th Cir. 1915)	8
Hart v. *United Steelworkers*, 350 F. Supp. 294 (W.D. Pa. 1972), *vacated as moot*, 482 F.2d 282 (3d Cir. 1973)	41
Hassett v. *Welch*, 303 U.S. 303 (1938)	22
Hodgson v. *American Can Co.*, 440 F.2d 916 (9th Cir. 1971)	27
Hodgson v. *Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), *aff'd sub nom. Hodgson* v. *Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972)	29
Hunter v. *United Air Lines, Inc.*, 10 Fair Empl. Prac. Cases (BNA), 787 (N.D. Cal. 1975)	24, 25, 26
International Brotherhood of Electrical Workers v. *Foust*, 442 U.S. 42 (1979)	26
In re Heath, 144 U.S. 92 (1892)	22
In re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980)	14
INS v. *Phinpathya*, —— U.S. ——, 104 S.Ct. 584 (1984)	23
Johnson v. *Al Tech Specialties Steel Corp.*, 731 F.2d 143 (2d Cir. 1984)	17, 32, 33
Kelly v. *American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981)	16, 17
Kendall v. *United States*, 37 U.S. (12 Pet.) 524 (1838)	22
Kincaid v. *United Steelworkers*, 5 Fair Empl. Prac. Cases (BNA) 235 (N.D. Ind. 1972)	41
La Chappelle v. *Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975)	17, 34
Laffey v. *Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973), *aff'd in part, vacated in part*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978)	11, 13
Lawn v. *United States*, 355 U.S. 339 (1958)	10
Lehman v. *Nakshian*, 453 U.S. 156 (1981)	26
Le Tulle v. *Scofield*, 308 U.S. 415 (1940)	8

TABLE OF AUTHORITIES—Continued

	Page
Liberles v. *County of Cook*, 709 F.2d 1122 (7th Cir. 1983)	14
Linda R.S. v. *Richard D.*, 410 U.S. 614 (1973)	8
Lorillard v. *Pons*, 434 U.S. 575 (1978)	passim
Luper v. *Edmondson Oil Co.*, 639 F.2d 1058 (4th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 457 U.S. 922 (1982)	14
Lyon v. *Temple University*, 507 F. Supp. 471 (E.D. Pa. 1981)	24
Marshall v. *A & M Consolidated Independent School District*, 605 F.2d 186 (5th Cir. 1979)	27
Marshall v. *Eastern Airlines, Inc.*, 474 F. Supp. 364 (S.D. Fla. 1979), *aff'd on other grounds sub nom. EEOC* v. *Eastern Airlines, Inc.*, 26 Empl. Prac. Dec. (CCH) ¶ 32,122 (5th Cir.), *cert. denied*, 454 U.S. 818 (1981)	14
Marshall v. *Keasling*, 82 Lab. Cas. (CCH) ¶ 33,562 (E.D. Mich. 1977)	15
Marshall v. *Tomba Janitorial Service, Inc.*, 82 Lab. Cas. (CCH) ¶ 33,559 (W.D. Mo. 1977)	28
Martinez v. *Bohring's Bearings Service, Inc.*, 501 F.2d 104 (5th Cir. 1974)	26
McMullans v. *Kansas, Oklahoma and Gulf Railway Co.*, 229 F.2d 50 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956)	39
Mitchell v. *Stewart Brothers Construction Co.*, 184 F. Supp. 886 (D. Neb. 1960)	15
Moon v. *Aerovox, Inc.*, 541 F. Supp. 747 (S.D. Ohio 1982)	41
Morelock v. *NCR Corp.*, 546 F.2d 682 (6th Cir. 1976), *vacated and remanded*, 435 U.S. 911 (1978)	32
Morley Construction Co. v. *Maryland Casualty Co.*, 300 U.S. 185 (1937)	8
Murphy v. *Miller Brewing Co.*, 307 F. Supp. 829 (E.D. Wis. 1969), *aff'd sub nom. Hodgson* v. *Miller Brewing Co.*, 457 F.2d 221 (7th Cir. 1972)	28

TABLE OF AUTHORITIES—Continued

	Page
Naton v. *Bank of California*, 649 F.2d 691 (9th Cir. 1981)	18
Neely v. *Martin K. Eby Construction Co.*, 386 U.S. 317 (1967)	10
Newman v. *Northwest Airlines, Inc.*, 29 Fair Empl. Prac. Cases (BNA) 1488 (N.D. Ill. 1982)	18, 27, 34
Northwest Airlines, Inc. v. *Transport Workers Union*, 451 U.S. 77 (1981)	passim
Northwest Airlines, Inc. v. *Transport Workers Union*, 606 F.2d 1350 (D.C. Cir. 1979), *aff'd in part, vacated in part*, 451 U.S. 77 (1981)	24, 29
Norton v. *Lindsay*, 350 F.2d 46 (10th Cir. 1965)	8
Pearce v. *Director, Office of Workers' Compensation Programs*, 603 F.2d 763 (9th Cir. 1979)	21
Pfeifer v. *Essex Wire Corp.*, 682 F.2d 684 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982)	17, 18, 32, 35
Powell v. *Washington Post Co.*, 267 F.2d 651 (D.C. Cir.), *cert. denied*, 360 U.S. 930 (1959)	26
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969)	25
Rhoades v. *Book Press*, 458 F. Supp. 674 (D. Vt. 1978)	41
Rodgers v. *Grow-Kiewit Corp.*, 93 Lab. Cas. (CCH) ¶ 13,431 (S.D.N.Y. 1981)	41
Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976)	8
Slatin v. *Stanford Research Institute*, 590 F.2d 1292 (4th Cir. 1979)	18
Spagnuolo v. *Whirlpool Corp.*, 641 F.2d 1109 (4th Cir. 1981)	17
Swarb v. *Lennox*, 405 U.S. 191 (1972)	8
Texas Industries, Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981)	36, 37, 38, 40
The Maria Martin, 79 U.S. (12 Wall.) 31 (1870)	8
Tuma v. *American Can Co.*, 367 F. Supp. 1178 (D.N.J. 1973)	24, 26
United Air Lines, Inc. v. *McMann*, 434 U.S. 192 (1977)	40

TABLE OF AUTHORITIES—Continued

	Page
United States v. *American Ry. Express Co.*, 265 U.S. 425 (1924)	8
United States v. *Reliable Transfer Co.*, 421 U.S. 397 (1975)	8
United States v. *Santana*, 427 U.S. 38 (1976)	10
United States v. *Stewart*, 311 U.S. 60 (1940)	25
Usery v. *Beloit College*, 12 Empl. Prac. Dec. (CCH) ¶ 11,203 (W.D. Wis. 1976)	28
Usery v. *Godwin Hardware, Inc.*, 426 F. Supp. 1243 (W.D. Mich. 1976)	15
Vazquez v. *Eastern Airlines, Inc.*, 579 F.2d 107 (1st Cir. 1978)	18, 33
Vocca v. *Playboy Hotel of Chicago, Inc.*, 519 F. Supp. 900 (N.D. Ill. 1981)	18
Webb v. *Beverly Hills Federal Savings & Loan Association*, 364 F.2d 146 (9th Cir. 1966)	8, 15
Wilkes v. *United States Postal Service*, 548 F. Supp. 642 (N.D. Ill. 1982)	30
Wirtz v. *Hayes Industries, Inc.*, 1 Empl. Prac. Dec. (CCH) ¶ 9,874 (N.D. Ohio 1968)	27, 28
Wirtz v. *Jones*, 340 F.2d 901 (5th Cir. 1965)	23
Wirtz v. *Marino*, 405 F.2d 938 (1st Cir. 1968)	22
Wirtz v. *Multhor, Inc.*, 391 F.2d 1 (9th Cir. 1968)	27
Wirtz v. *Pure Ice Co.*, 322 F.2d 259 (8th Cir. 1963)	29
Wirtz v. *Soft Drinks of Shreveport, Inc.*, 336 F. Supp. 950 (W.D. La. 1971)	15-16
Wood v. *Meier*, 218 F.2d 419 (5th Cir. 1955)	15
Wust v. *Northwest Airlines, Inc.*, 86 Lab. Cas. (CCH) ¶ 33,811 (W.D. Wash. 1979)	24
Wplain, Inc. v. *Kidde Consumer Durables Corp.*, 74 F.R.D. 434 (D. Del. 1977)	14

STATUTES

Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634	passim
Section 4, 29 U.S.C. § 623	16, 18
Section 4(a), 29 U.S.C. § 623(a)	22, 39

TABLE OF AUTHORITIES—Continued

	Page
Section 4(e), 29 U.S.C. § 623(e)	4, 12, 35
Section 4(d), 29 U.S.C. § 623(d)	12, 39
Section 4(f)(1), 29 U.S.C. § 623(f)(1)	2, 9, 22
Section 7(b), 29 U.S.C. § 626(b)	passim
Section 7(c), 29 U.S.C. § 626(c)	17
Section 15, 29 U.S.C. § 633(a)	26
Equal Pay Act of 1963, 29 U.S.C. § 206(d)	passim
Section 6(d)(1), 29 U.S.C. § 206(d)(1)	19, 39
Section 6(d)(2), 29 U.S.C. § 206(d)(2)	12, 19
Section 6(d)(3), 29 U.S.C. § 206(d)(3)	12
Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219	passim
Section 3(a), 29 U.S.C. § 203(a)	20, 24
Section 3(d), 29 U.S.C. § 203(d)	12, 20, 23, 24, 29
Section 6, 29 U.S.C. § 206	19, 20, 37, 38
Section 7, 29 U.S.C. § 207	19, 20, 26, 37, 38, 39
Section 11(a), 29 U.S.C. § 211(a)	20
Section 15(a)(2), 29 U.S.C. § 215(a)(2)	19, 20, 23, 24
Section 15(a)(3), 29 U.S.C. § 215(a)(3)	19, 24, 25, 26, 39
Section 16(a), 29 U.S.C. § 216(a)	19, 20, 23, 30
Section 16(b), 29 U.S.C. § 216(b)	19, 20, 22, 23, 24, 25, 30, 32, 34
Section 16(c), 29 U.S.C. § 216(c)	19, 20, 21, 22, 23
Section 17, 29 U.S.C. § 217	20, 22, 26, 28, 29, 30, 32
Labor Management Relations Act, 29 U.S.C. §§ 141-187	36
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950	31
Portal-To-Portal Act of 1947, 29 U.S.C. §§ 251-262	22
Section 6, 29 U.S.C. § 255	22
Section 11, 29 U.S.C. § 260	22, 30
Railway Labor Act, 45 U.S.C. §§ 151-188	36

TABLE OF AUTHORITIES—Continued

	Page
Title IV of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801-962	30-31
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17	passim
Section 703(a), 42 U.S.C. § 2000e-2(a)	39
Section 703(e), 42 U.S.C. § 2000e-2(e)	12, 35
Section 706(g), 42 U.S.C. § 2000e-5(g)	13, 35
Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1)	13
RULES AND REGULATIONS	
14 C.F.R. § 12.383(e)	2
LEGISLATIVE SOURCES	
Legislative History of the Age Discrimination in Employment Act	
H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 13-14, *reprinted in* 1978 U.S. Code Cong. & Ad. News 528, 536	34
Age Discrimination in Employment: Hearings on H.R. 3651, 3768, 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 95th Cong., 1st Sess. 418 (1967)	41
113 Cong. Rec. 31,254 (1967)	17
Pub. L. No. 90-202, 81 Stat. 602 (1967)	21
Sec. 7 (b), 81 Stat. 604	21
Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978)	2
Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 7(a), 92 Stat. 95, 98 (1978)	31
Legislative History of the Fair Labor Standards Act	
S. Rep. No. 640, 81st Cong., 1st Sess., *reprinted in* 1949 U.S. Code Cong. & Ad. News 2241	23
S. Rep. No. 145, 87th Cong., 1st Sess. (1961), *reprinted in* 1962 U.S. Code Cong. & Ad. News 1620	30

TABLE OF AUTHORITIES—Continued

	Page
Pub. L. No. 87-30, 12(b), 75 Stat. 65, 82 (1961)	26
Pub. L. No. 93-259, 88 Stat. 55 (1974)	25
Section 6(d)(1), 88 Stat. 61-62	25
Section 26, 88 Stat. 73	21
Pub. L. No. 95-151, 91 Stat. 1265 (1977)	25
Section 10, 91 Stat. 1252	25
Legislative History of Title VII of the 1964 Civil Rights Act	
H.R. Rep. No. 570, 88th Cong., 1st Sess. 2, 3 (1963)	40
S. Rep. No. 867, 88th Cong., 2d Sess. 5, 6, 11, 22 (1963)	40
Equal Opportunity in Employment: Hearings on H.R. 405 and Similar Bills Before the General Subcomm. on Education and Labor, 88th Cong., 1st Sess. (1963)	41
Equal Opportunity in Employment: Hearings on S. 773, 1210, 1211 1937 Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. (1963)	40-41
MISCELLANEOUS	
3 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 14.11, at 14-64 to 67 (2d ed. 1984)	15
3A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 19.11, at 19-233 to 234 (2d ed. 1984)	14
RESTATEMENT (SECOND) OF TORTS (1977)	
Section 875	14
Section 883	15
Section 885(1), (2)	14, 15
United States Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* (1965)	40
W. PROSSER, THE LAW OF TORTS § 47, at 296-97 (4th ed. 1971)	15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-997, 83-1325

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,
v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL Respondent in No. 83-997

PRELIMINARY STATEMENT

Air Line Pilots Association, International ("ALPA"), petitioner in No. 83-1325 and respondent in No. 83-997, respectfully submits this brief on the merits as respondent in No. 83-997.

STATUTES INVOLVED

Pertinent provisions of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, and of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-2000e-17, are set forth in the Supplemental Appendix, annexed hereto.

STATEMENT OF THE CASE

ALPA filed a brief in these consolidated cases as petitioner in No. 83-1325. The Statement of the Case in that brief describes TWA's employment of flight deck crew members and the procedural history of this case (ALPA Br. as Petitioner at 4-7), and will be repeated or enlarged only as relevant to the present brief.

A. TWA's Retirement Practices

For approximately twenty years, TWA retired all flight deck crew members (captains, first officers, international relief officers and flight engineers) at age 60. The 1978 amendments to the ADEA, effective April 6, 1978, eliminated a bona fide employee benefit plan defense to mandatory retirement at age 60. Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978).

In August, 1978, TWA unilaterally decided to permit flight engineers to continue in their jobs past age 60, but to retain its policy of retiring captains and first officers when they reached age 60, J.A. 425, because they were subject to the FAA Age 60 Rule, 14 C.F.R. § 121.383(c), which is a bona fide occupational qualification ("BFOQ") under § 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1). TWA Br. at 28 n.35. TWA determined that it could allow flight engineers to serve past age 60 because, in its view, they were not subject to a BFOQ, and § 4.2 of the collectively bargained pilot retirement plan provided that any crew member could serve past the normal retirement date (age 60) with "written approval of the company." J.A. 243, 410.

In implementing its August, 1978 policy, TWA routinely permitted captains who successfully bid for flight engineer positions in order to serve past age 60 to postpone training past the effective date of the bid, so that they could work as captains until age 60. J.A. 59. All other crew members were scheduled for training so as to be qualified for a new position as close as possible to the effective date of their bids. *Id.* In early 1980 TWA modified its practice to require captains who downbid in order to serve past age 60 to fulfill their bids in the same timely manner as other crew members.[1]

On July 25, 1979, ALPA and TWA signed a collective bargaining agreement ("Agreement"), effective August 1,

---

[1] At a meeting in January, 1980, ALPA representatives suggested that the practice of treating captains approaching age 60 more favorably than other pilots was contrary to the collective bargaining agreement. At some time after that meeting, TWA began to require downbidding captains to enter training on the same basis as other crew members. J.A. 1069. As a result of this change, captains who successfully bid for flight engineer positions were scheduled to begin training one to four months prior to age 60. J.A. 765-6. The deposition of Joseph C. Hilly, TWA Vice-President, Labor Relations, which is the only evidence in the record concerning TWA's decision to require downbidding captains to fulfill their bids in a timely manner, indicates that Mr. Hilly could not recall whether or not this change in TWA's practices was a result of the meeting with ALPA: "It just so happened that our reading of the agreement coincided on that possibility." J.A. 1071.

While the Court of Appeals concluded that "the evidence is undisputed that ALPA caused TWA to institute the requirement that successful downbidders 'fulfill their bids in a timely manner,' resulting in the cancellation of bids awarded three downbidding EEOC plaintiffs . . ." A-32, only two plaintiffs reached age 60 after January 1980 (H.W. Lewis, 11/24/80; D.V. Roquemore, 8/21/81). TWA Br. at 13 n.16. Moreover, plaintiffs never claimed that the "timely manner" policy resulted in the cancellation of bids, but rather asserted that this change caused *successfully* downbidding captains to lose "pay and responsibility, in contrast to the 1979 situation when virtually all downbidders were permitted to complete their full careers as captains." Appellants' Br. at 18, Court of Appeals, Nos. 82-6266, 6280, 6306.

1979, which superseded the prior agreement in effect July 20, 1977 to July 31, 1979. J.A. 147, 337-38. Section 4.2 of the retirement plan was retained in the 1979 Agreement. A-32. Neither party had proposed any modification of § 4.2 in the 1979 negotiations. J.A. 158.

B. Decision of the Court Below

The Court of Appeals held that "ALPA is liable under 29 U.S.C. § 623(c)(3) to the *EEOC plaintiffs* who were damaged by its conduct." A-33 (emphasis added). In a footnote, the court explicated the basis for its decision: "ALPA's actions in signing the post-1978 Working Agreements and in causing TWA to implement other restrictions on the downbidding older captains and flight engineers render it liable under § 623(c)(3). . . ." A-33 n.19. The court's reference to "other restrictions" was to the requirement that downbidding captains "fulfill their bids in a timely manner." A-32.[2]

With respect to the subject EEOC plaintiffs, the Court of Appeals held that "the remedial scheme of the ADEA,

[2] As the effective date of the "post-1978 Working Agreement" was August 1, 1979, and the requirement to "fulfill . . . bids in a timely manner" was not implemented until after January, 1980, the court's holding that ALPA is liable "to the EEOC plaintiffs who were damaged by its conduct" refers to the three EEOC plaintiffs who reached age 60 on or after August 1, 1979. (The retirement dates of the three individual and seven EEOC plaintiffs are set forth in TWA's Br. at 13 n.16. All three individual plaintiffs, and four EEOC plaintiffs, reached age 60 and were terminated in accordance with TWA's unilateral August, 1978 policy on or before November 10, 1978).

While the court below also noted that "ALPA actively campaigned to persuade TWA to retain its age-60 retirement policy for all flight deck crew positions, [and] opposed TWA's unilateral action in August 1978 to attempt partial compliance with the ADEA," it did not find that these *unsuccessful* attempts caused injury to plaintiffs, nor could it have so found by summary judgment where the record contained statements by TWA management that ALPA played no role in the formulation of the August, 1978 policy. J.A. 1005A, 1050-52.

which incorporates that of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219; *Lorillard* v. *Pons*, 434 U.S. 575 (1978), does not permit actions to recover monetary damages, including backpay, against a labor organization." A-38.

C. Position of the Parties before this Court

TWA seeks to present the question of a union's monetary liability for a violation of the ADEA in the event that this Court affirms the judgment of the court below that TWA and ALPA jointly violated the ADEA as to certain EEOC claimants. Prior to its petition for certiorari, TWA had not asserted that ALPA should bear any part of the monetary liability which might result from the application of its August, 1978 policy: TWA did not file a cross-claim against ALPA, or otherwise allege in its answers that ALPA was responsible for any injuries caused by its policies, J.A. 74, 91, 99, nor did TWA raise this issue in opposing plaintiffs' request for summary judgment on appeal.

While individual plaintiffs originally sought to obtain "backpay and any other pecuniary loss or amounts owing them by defendants," plus liquidated damages, J.A. 68, and the EEOC sought to require "[d]efendants TWA and ALPA to pay appropriate back wages, and an equal sum as liquidated damages. . . ," J.A. 97, all plaintiffs elected *not* to file conditional cross-petitions to seek review of that aspect of the Court of Appeals judgment that the ADEA does not permit recovery of "monetary damages, including backpay, against a labor organization."[3] Rather, plaintiffs made the tactical decision to forgo review by this Court and instead seek recovery of damages only

[3] Individual plaintiffs also declined to appeal from the judgment holding ALPA liable only to "EEOC plaintiffs." TWA does not contest this aspect of the judgment. Accordingly, the only issue posed by TWA relates to potential damages to certain EEOC claimants.

from TWA. EEOC Br. in Opp. to TWA Pet. for Cert. in No. 83-997, at 19 n.16; Thurston Br. in Opp. to TWA Pet. for Cert. in No. 83-997, at 10.

SUMMARY OF ARGUMENT

Unless this Court reverses the summary judgment finding ADEA violations, TWA will be subject to "total monetary liability." TWA Br. at 44. Not wishing to be "stuck" with this liability, *id.*, TWA asks the Court to rule that ALPA should also pay damages—even though the EEOC, representing members of the class for whose benefit the ADEA was enacted, has decided not to seek damages from ALPA and is bound by an unappealed judgment limiting the EEOC claimants to damages from the employer.

TWA plainly may not assert the EEOC's rights; even if it could, it would still be seeking only an advisory opinion, since the EEOC is bound by the judgment below. Nor should the Court consider whether TWA has a right to have ALPA pay damages, since that issue was neither presented to nor considered or decided by the courts below.

TWA is in no different a position than any other joint violator "stuck" for all of the damages, who asserts that it is unfair that plaintiff has recovered, or will recover, full relief from him alone. This type of claim by a joint violator, whatever the stage of litigation at which it is made, merely asserts a right of contribution. The Court in *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77 (1981), held that neither Title VII nor the Equal Pay Act, 29 U.S.C. § 206(d) ("EPA"), authorized an employer to "compel the union to share the responsibility for a joint violation of a third party's rights." 451 U.S. at 93. Since the remedial provisions of the ADEA, like those of the EPA, are adopted from the FLSA, and the ADEA's substantive prohibitions are

drawn from Title VII, TWA plainly has no right to contribution under the ADEA.

Finally, as the FLSA provides no damages remedy against labor organizations, and the ADEA does not modify those provisions of the FLSA, the court below correctly ruled that the EEOC has no right to obtain damages from ALPA. The EEOC cannot in any event secure liquidated damages under the ADEA. The judgment limiting the EEOC to securing monetary relief against TWA should be affirmed.

ARGUMENT

I. TWA HAS NO RIGHT TO ASSERT THE EEOC'S CLAIM FOR DAMAGES OR OTHERWISE COMPEL ALPA TO SHARE ITS FINANCIAL RESPONSIBILITY.

Two distinct issues are encompassed in the question presented by TWA: 1) whether the *EEOC* may secure damages from ALPA; and 2) whether *TWA* may compel ALPA to share its financial responsibility, where the EEOC has decided to seek its damages from the employer alone. These issues are wholly separate: if, as an abstract proposition, the EEOC may secure a money award from unions under the ADEA, that does not determine whether TWA as a joint violator could compel ALPA to pay. *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 88-89 & n.20, 92 n.25 (1981). TWA may not assert plaintiffs' claims. TWA's claim was not presented below and has no basis in the ADEA. The Court should not disturb a judgment denying union liability for money damages to EEOC claimants which has not been appealed by the EEOC.

A. The EEOC's Claim for Damages against ALPA Is Not Properly before the Court.

Insofar as TWA seeks to hold ALPA responsible for injuries to EEOC claimants, only the EEOC may assert

their claim for damages.[4] The EEOC agrees: "[T]he proper parties to seek further review of this issue would be [plaintiffs], the ones who were injured by ALPA's discriminatory conduct." EEOC Br. in Opp. to TWA Pet. for Cert. at 19. Since plaintiffs have not done so, TWA's "claim should be rejected." *Id.*

TWA seeks an advisory opinion beyond the power of the Court. In the event that TWA may be unable to answer to the total judgment against it, the Court of Appeals judgment denies the EEOC any recourse against ALPA. As the EEOC filed no cross-petition to reverse this adverse aspect of the judgment, it is bound by the judgment, and may not, as a respondent, seek to enlarge its rights on appeal.[5] A decision here that unions may be subject to damages under the ADEA could have no subsequent effect in this proceeding; lacking effect, it would be advisory.[6]

---

[4] *See, e.g., Capital Cities Cable, Inc.* v. *Crisp*, —— U.S. ——, 52 U.S.L.W. 4805, 4806 n.6 (U.S. June 19, 1984); *Beebe* v. *Highland Tank and Manufacturing Co.*, 373 F.2d 886, 890 (3d Cir.), *cert. denied*, 388 U.S. 911 (1967); *Webb* v. *Beverly Hills Federal Savings & Loan Association*, 364 F.2d 146, 149 (9th Cir. 1966); *Norton* v. *Lindsay*, 350 F.2d 46, 48 (10th Cir. 1965); *Hamilton Trust Co.* v. *Cornucopia Mines Co.*, 223 F. 494 (9th Cir. 1915). As the court stated in *Hamilton Trust Co.*, "the right or title which appellant seeks to establish must be his own and not that of a third person." 223 F. at 499.

[5] *See, e.g., United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516 (1973); *Search* v. *Lorenz*, 405 U.S. 191, 201 (1972); *La Tulle* v. *Scofield*, 308 U.S. 415, 421-22 (1940); *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191-92 (1937); *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924); *The Maria Martin*, 79 U.S. (12 Wall.) 31, 40, 41 (1870).

[6] *See, e.g., Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973) (decision regarding enforcement of criminal support law would be purely advisory since imprisonment of delinquent father would not affect petitioner's rights); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976) (absent showing that

B. TWA Has No Right to Compel ALPA to Share Responsibility for Damages under the ADEA.

TWA complains that it should not be "stuck with total monetary liability," TWA Br. at 44, although the EEOC has decided that it is better served by seeking its monetary remedies from the employer alone. TWA's claim is simply another formulation of a request for contribution from a joint violator. TWA asserts that right for the first time here, and has, in any event, no statutory right to shift damages.

1. *TWA's belated effort to shift damages to ALPA should not be considered.*

The issue of TWA's right to shift damages was not raised, considered or decided in the courts below. TWA did not assert a cross-claim against ALPA in its answers nor otherwise plead that any injury alleged by plaintiffs was a result of conduct by ALPA. J.A. 74, 91, 99. When it opposed plaintiffs' request for summary judgment in the Court of Appeals, TWA did not claim that any portion of the damages should be recovered from ALPA rather than TWA. TWA Br. as Appellee, No. 82-4266. The issue is raised here for the first time in the entire course of this litigation.[7]

This Court "will not ordinarily consider" issues "neither raised before nor considered by the Court of Appeals." *Adickes* v. *S.H. Kress and Co.*, 398 U.S. 144, 147

---

the injury may be redressed by a favorable decision, decision by a federal court would be "gratuitous and thus inconsistent with Art. III limitations.")

[7] TWA has consistently taken the position that the pilot collective bargaining agreement did not require retirement at age 60. A-14. TWA argues that it required captains to retire at age 60 because they were subject to the FAA Age 60 Rule, a BFOQ under § 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1). TWA Br. at 28 n.35. As petitioner in No. 83-1325, ALPA argues that TWA's decision was authorized by § 4(f)(1) of the ADEA.

n.2 (1970).[9] It is only in "exceptional circumstances" that the Court departs from this rule. *See Capital Cities Cable, Inc.* v. *Crisp*, —— U.S. ——, 52 U.S.L.W. 4803, 4805 (U.S. June 19, 1984); *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958). TWA has argued that it was not necessary to file a cross-claim, or, in the alternative, that a cross-claim could be asserted under Fed. R. Civ. P. 15, "even after judgment." TWA Reply Br. in Support of Pet. for Cert. at 5 n.**. If the discretionary rule of this Court not to consider issues neither raised nor decided in the courts below could be circumvented by the possibility of a subsequent amendment of the pleadings, it would cease to exist.[9] TWA has not explained why it waited until after judgment to assert a cross-claim, or, indeed, offered any reason why its claim against ALPA should be initially considered by this Court.

2. *TWA has no right to shift damages.*

TWA's effort to shift damages should in any event be rejected. This Court has held that an employer has neither a federal statutory nor common law right under either the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), or Title VII "to compel [a] union to share responsibility for a joint violation of a third party's rights." *Northwest Airlines*, 451 U.S. at 93. The Court in *Northwest Airlines* ruled that neither the language of the referenced statutes, nor their structure and legislative histories, supported an implied damages remedy by employers against unions, and that it would be improper for federal courts to add such a remedy to comprehensive legislative schemes

[9] *See also United States* v. *Santana*, 427 U.S. 38, 41 n.2 (1976); *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957).

[9] In *Forman* v. *Davis*, 371 U.S. 178 (1962), on which TWA relies, TWA Reply Br. in Support of Pet. for Cert. at 5 n.**, the issue concerning post-judgment amendment of the pleadings had been raised in and decided by the Court of Appeals. 371 U.S. at 182.

which included integrated remedial and enforcement procedures. Although *Northwest Airlines* was a separate lawsuit for contribution by an employer held liable for monetary relief under Title VII and the EPA,[10] it applies with equal force to the present case where TWA seeks, by writ of certiorari, to shift damages under the ADEA.

In *Northwest Airlines*, the Court assumed that all the elements of a contribution claim had been established and that the policies of the EPA and Title VII supported a right to contribution. 451 U.S. at 88-90.[11] Nonetheless, no right to shift damages could be implied from the statutes since employers are not "members of the class for whose especial benefit either the Equal Pay Act or Title VII was enacted." 451 U.S. at 92. Moreover, the "comprehensive character of the [applicable] remedial scheme expressly fashioned by Congress," and the silence of each statute's legislative history, strongly argued against a Congressional intent to create additional remedies. 451 U.S. at 93.

[10] *See Lafley* v. *Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973), *aff'd in part, vacated in part*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

[11] Those elements being: (1) that the union was "at least partially responsible" for the proven statutory violations; and (2) that the plaintiffs "could have asserted a claim for monetary relief against their unions" under the EPA and Title VII. *Northwest Airlines*, 451 U.S. at 88-89 & n.20.

Since this Court assumed that the unions in *Northwest Airlines* were also responsible for the proven EPA and Title VII violations, the Court of Appeals' finding here that ALPA was partially responsible for the alleged ADEA violations is not a basis to distinguish *Northwest Airlines*. For the same reason, TWA's policy arguments—the same noted in *Northwest Airlines*—are equally unavailing. *Compare* TWA Br. at 39-41 with *Northwest Airlines*, 451 U.S. at 89 n.21.

In *Lorillard* v. *Pons*, 434 U.S. 575 (1978), the Court described the ADEA as a "hybrid" statute, incorporating, with a few express modifications, the procedures, remedies and enforcement mechanisms of the FLSA, 434 U.S. at 578-79, and the substantive prohibitions of Title VII, *id.* at 584. The EPA was enacted as an amendment to the FLSA, and, like the ADEA, adopts the remedial, procedural and enforcement mechanisms of the FLSA. 29 U.S.C. § 206(d)(3). Whether one looks to the remedial scheme of the ADEA, adopted from the FLSA, or its substantive provisions, modeled after Title VII's prohibitions, *Northwest Airlines* makes clear that a defendant has no right to compel a joint violator to pay damages under the ADEA.

Employers are no more members of the class for whose "especial benefit" the ADEA was enacted than they are beneficiaries of Title VII or the EPA. The legislative history of the ADEA is no less mute regarding the creation of employer remedies against codefendant unions than that of Title VII or the EPA.[10] There is thus no indication that Congress, in enacting the ADEA, intended to permit employers to shift their liability for damages to union codefendants. In view of the ADEA's comprehensive remedial scheme, it is no more appropriate for federal courts to create a new remedy for employer-defendants under ADEA than it is to do so under Title VII or the EPA. *See Northwest Airlines*, 451 U.S. at 97.

TWA argues that § 7(b) of ADEA, 29 U.S.C. § 626(b), which provides that a court "shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act," permits a court to assess damages against a union as well as an employer. TWA Br. at 39-40. This language in § 7(b) does not provide any greater right to an employer to shift damages to the union than did analogous language in § 706(g) of Title VII[11] at issue in *Northwest Airlines*.[12] The power of a court to grant remedies under § 7(b) of the ADEA effectuates the statutory rights of plaintiffs; the ADEA does not impose any duty on a plaintiff to sue all potential defendants, nor does it authorize any one defendant to litigate plaintiff's claim for damages against a codefendant who successfully defeats that claim at any stage of the proceeding.

Whatever power a court may have to award monetary relief under the ADEA against all of the defendants from whom plaintiffs seek damages, there is no power,

---

[10] The legislative history cited by TWA, Br. at 41, indicates only that ADEA's substantive prohibitions apply to unions as well as employers, which the statute expressly provides in 29 U.S.C. § 623(c) and (d). As both Title VII, 42 U.S.C. § 2000e-2(c), and the EPA, 29 U.S.C. § 206(d)(2), also prohibit union violations, this legislative history is irrelevant to the question whether employers may shift any of their monetary liability to unions.

[11] Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), authorizes the court under Title VII to order "such affirmative action as may be appropriate . . . or any other equitable relief as the court deems appropriate."

[12] In *Northwest Airlines*, the Court referred to the "broad power under § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), to fashion relief against all respondents named in a property filed charge." 451 U.S. at 98 n.28. The Court's statement could only have referred to respondents who had been charged and whom plaintiffs had sued for damages; a mere respondent to a charge is not a defendant to a damages claim unless named and served in a court action. *See* 42 U.S.C. § 2000e-5(f)(1) (charging party may bring "civil action" against respondent). *Cf. Baldwin County Welcome Center* v. *Brown*, —— U.S. ——, 104 S.Ct. 1723 (1984) (Title VII action must be commenced by filing a timely complaint; plaintiff cannot rely on EEOC charge or filing notice of right to sue in federal court). The District Court in *Lafey* could not have found the union responsible for damages even if it had been a respondent to a charge, because plaintiffs chose not to sue the union, which was made a party to that litigation only to enable the court to implement complete injunctive relief. *See Northwest Airlines*, 451 U.S. at 81 n.5. Plaintiffs here have abandoned their claim for damages against ALPA, so that ALPA is now in precisely the same position in this case as the unions in *Lafey* and *Northwest Airlines*.

where the plaintiffs have abandoned their claim for damages against a defendant, to hold that defendant liable at the instance of another, unless the latter has a right of contribution. The procedural context in which a right to contribution is asserted cannot add to the substantive statutory rights which Congress has created. If there is no right to contribution in an independent action for contribution against a union, that right cannot be created by use of a third-party complaint, cross-claim, or, as in the instant case, by petition for writ of certiorari.[16]

Where liability is joint and several, it is settled that no defendant may compel a plaintiff to seek or enforce a monetary judgment from another potential or actual defendant.[17] Any violator is wholly liable without respect to the liability of others. Judgment against him is enforceable in full, whether or not plaintiff could secure or enforce a judgment against other persons. Since an appeal has no effect on the judgment against him, the ad-

---

[16] *Separate action:* Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981); Anderson v. Local 3, International Brotherhood of Electrical Workers, 582 F. Supp. 427 (S.D.N.Y. 1984), appeal docketed, No. 84-7384 (2d Cir. 1984).

Third Party Complaint: Germann v. Pekow, 531 F. Supp. 358 (N.D. Ill. 1981).

Joinder of indispensable party: Liberles v. County of Cook, 709 F.2d 1122 (7th Cir. 1983); Marshall v. Eastern Airlines, Inc., 474 F. Supp. 364 (S.D. Fla. 1979), aff'd on other grounds sub nom. EEOC v. Eastern Airlines, Inc., 26 Empl. Prac. Dec. (CCH) ¶ 32,122 (5th Cir.), cert. denied, 454 U.S. 818 (1981); Atkinson v. Owens-Illinois Glass Co., 10 Fair Empl. Prac. Cases (BNA) 710 (N.D. Ga. 1975).

[17] *See, e.g.*, Leger v. Edmondson Oil Co., 639 F.2d 1058, 1065 n.14 (6th Cir. 1981), aff'd in part, rev'd in part on other grounds, 457 U.S. 922 (1982); In re Uranium Antitrust Litigation, 617 F.2d 1248, 1257 (7th Cir. 1980); Wiginton, Inc. v. Kiddie Consumer Durables Corp., 74 F.R.D. 434, 437 (D. Del. 1977). *See also* 5A J. Moore, Moore's Federal Practice ¶ 19.11, at 19-233 to 234; (2d ed. 1984); Restatement (Second) of Torts §§ 875, 885(1), (2) (1977).

judicated joint violator simply has no appealable interest in the dismissal of other defendants, and may not appeal a judgment in favor of a codefendant.[17]

In this case TWA and ALPA were found liable for a joint violation of the ADEA. TWA Br. at 16, 38. Plaintiffs agree that defendants' liability under the FLSA, and hence, the ADEA, is joint and several. *See* EEOC Br. in Opp. to TWA's Pet. for Cert. at 19 & n.16 and cases cited therein; Thurston Br. in Opp. to TWA's Pet. for Cert. at 10 and n.14. The joint and several liability of joint violators of the FLSA was well established before the enactment of the ADEA in 1967,[18] and is no less

---

[17] *See, e.g.*, Burke v. Highland Tank and Manufacturing Co., 373 F.2d 886, 890 (3d Cir. 1967), cert. denied, 389 U.S. 911 (1967); Webb v. Beverly Hills Federal Savings & Loan Association, 364 F.2d 146, 149 (9th Cir. 1966); Albert Miller & Co. v. Wilkins, 269 F. 582, 585 (7th Cir. 1915); W. Prosser, The Law of Torts, § 47, at 296-97 (4th ed. 1971). *Cf. Corsicana National Bank v. Johnson*, 251 U.S. 68, 93 (1919); Conklin v. Baltimore & Annapolis Railroad, 178 F.2d 521 (9th Cir. 1949); Restatement (Second) of Torts, §§ 885, 885(1), (2); 5 J. Moore, Moore's Federal Practice ¶ 14.11, at 14-44 to 47 (2d ed. 1984) and cases cited therein.

[18] *See, e.g.*, Wood v. Meier, 218 F.2d 433, 439 (5th Cir. 1955); Greenberg v. Arsenal Bldg. Corp., 58 F. Supp. 780, 784 (S.D.N.Y. 1945), modified on other grounds and otherwise aff'd, 144 F.2d 252 (2d Cir. 1944), aff'd in relevant part sub nom. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945); Mitchell v. Stewart Brothers Construction Co., 191 F. Supp. 886, 890 (D. Neb. 1960); Goldberg v. Dio Bar Co., 45 Lab. Cas. (CCH) ¶ 31,333, at 11,628 (S.D. Cal. 1962).

This principle continues to govern FLSA enforcement. *See, e.g.*, Donovan v. Agnew, 712 F.2d 1509, 1511 (1st Cir. 1983); Donovan v. Sabine Irrigation Co., 695 F.2d 190, 194-95 (5th Cir.), cert. denied, —— U.S. ——, 103 S.Ct. 3537 (1983); Donovan v. Mastic Industries, Inc., 552 F. Supp. 1024, 1025 (E. Mass. 1982); Altmore v. Stevens Fashion Fabrics, 441 F. Supp. 1318, 1321 (N.D. Cal. 1977); Brennan v. Whitley, 422 F. Supp. 465, 469 (E.D. Tex. 1977); Marshall v. Keasling, 82 Lab. Cas. (CCH) ¶ 33,162, at 47,036 (E.D. Mich. 1977); Usery v. Godwin Hardware, Inc., 426 F. Supp. 1263, 1266 (W.D. Mich. 1976); Wirtz v. Soft Drinks of Shreveport,

incorporated in the ADEA than the right to a jury trial in a private action. *See Lorillard*, 434 U.S. at 581 (in enacting the ADEA, Congress is presumed to have been aware of the judicial interpretation given to the incorporated sections of the FLSA)."[29] As a joint violator of the statute, TWA has no right to appeal dismissal of a codefendant. Whether or not the EEOC could secure damages from ALPA, TWA remains fully liable, and has no appealable interest in the ruling below that ALPA is not liable for monetary relief. Accordingly, TWA's petition concerning union liability must be denied.

II. THE ADEA DOES NOT AUTHORIZE MONETARY RELIEF AGAINST LABOR ORGANIZATIONS.

A. Congress Fully Incorporated into the ADEA the Remedial Scheme of the FLSA with Respect to the Recovery of Lost Wages and Benefits.

Section 4 of the ADEA expressly prohibits certain conduct by employers and labor organizations. These obligations are "enforced through express incorporation of the remedial rights and procedures of the [FLSA], rather than through independent ADEA remedies." *Kelly* v. *American Standard, Inc.*, 640 F.2d 974, 977-78 (9th Cir. 1981). Section 7(b) of the ADEA, 29 U.S.C. § 626(b), states that a prohibited act under § 4 of the ADEA "shall be deemed to be a prohibited act under Section 15" of the FLSA, 29 U.S.C. § 215, and further provides that "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in"

Inc., 336 F. Supp. 960, 968 (W.D. La. 1971). *But see EEOC* v. *Air Line Pilots Association, International*, 489 F. Supp. 1002 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981).

[29] The ADEA incorporates the remedial scheme of the FLSA. *Lorillard*, 434 U.S. at 580-85, and nothing in § 7(b) of the ADEA suggests that Congress intended in the ADEA to modify the FLSA rule of joint and several liability for a joint violation. *Id.* at 582-83.

sections 11(b), 16 (except § 16(a)) and 17 of the FLSA, and § 7(c) of the ADEA."[30] 29 U.S.C. § 626(b) (emphasis added).

In *Lorillard*, this Court determined that Congress intended to incorporate the "remedies and procedures of the FLSA" into the ADEA "'to the greatest extent possible. . . .'" 434 U.S. at 582, *quoting* 113 Cong. Rec. 31,254 (1967) (remarks of Sen. Javits, a floor manager of the bill). Indeed, the EEOC bases its position that defendants are jointly and severally liable for a joint ADEA violation on FLSA and Equal Pay Act cases. EEOC Brief in Opposition to TWA's Petition for Certiorari at 19 n.16. TWA also argues that the ADEA must be enforced in accordance with the FLSA as it stood when the ADEA was enacted. TWA Br. at 37 n.49. The lower federal courts have decided a broad range of remedial and procedural issues concerning the enforcement of the ADEA by reference to FLSA remedies and procedures.

---

[30] Section 7(c) of the ADEA has been construed "to give individuals the ability to take advantage of the relief conferred in § 626(b)," but is not "an independent source of remedies under the statute." *Pfeifer* v. *Essex Wire Corp.*, 682 F.2d 684, 685 n.1 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982). *See generally Lorillard* v. *Pons*, 434 U.S. at 581-82, 583 n.11; *Burns* v. *Equitable Life Assurance Society*, 696 F.2d 21, 23 (2d Cir. 1982), *cert. denied*, —— U.S. ——, 104 S.Ct. 336 (1983).

[31] *Class action procedures:*

See, e.g., La Chappelle v. *Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975).

Award of prejudgment interest:

Gibson v. *Mohawk Rubber Co.*, 695 F.2d 1093, 1102 (8th Cir. 1982); *Spagnuolo* v. *Whirlpool Corp.*, 641 F.2d 1109, 1114 (4th Cir. 1981); *Kelly* v. *American Standard, Inc.*, 640 F.2d 974, 983 (9th Cir. 1981).

Punitive Damages and Damages for Pain and Suffering:

See, e.g., Johnson v. *Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147-48 (2d Cir. 1984); *Fiedler* v. *Indianhead Truck Line,*

Thus, "[i]n order to determine whether a union may be held liable to one of its members for his lost wages under the ADEA, it is necessary to determine whether a union would have such liability under the FLSA." *Neuman* v. *Northwest Airlines, Inc.*, 28 Fair Empl. Prac. Cases (BNA) 1488, 1490 (N.D. Ill. 1982). TWA concedes that unions are not subject to monetary remedies under the remedial scheme of the FLSA, but argues that "the selectivity in the FLSA should not be applied woodenly" under the ADEA in light of the "legal relief" authorized in § 7(b) of the ADEA, 29 U.S.C. § 626(b). TWA Br. at 40. However, as shown *infra*, at pp. 30-34, the language of § 7(b), as construed by this Court and the lower federal courts, does not provide an additional monetary remedy for labor organization violations of § 4 of the ADEA which was not provided in §§ 16 and 17 of the FLSA for labor organization violations of § 15 of the FLSA.

Inc., 670 F.2d 806, 810 (8th Cir. 1982); *Pfeifer* v. *Essex Wire Corp.*, 682 F.2d at 686; *Naton* v. *Bank of California*, 649 F.2d 691, 699 (9th Cir. 1981); *Slatin* v. *Stanford Research Institute*, 590 F.2d 1292 (4th Cir. 1979); *Vazquez* v. *Eastern Airlines, Inc.*, 579 F.2d 107 (1st Cir. 1978); *Dean* v. *American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978).

EEOC Right to Jury Trial:

See EEOC v. *Corry Jamestown Corp.*, 719 F.2d 1219, 1223 (3d Cir. 1983). *Accord EEOC* v. *Brown & Root, Inc.*, 725 F.2d 348 (5th Cir. 1984).

Attorney's Fees:

Voces v. *Playboy Hotel of Chicago, Inc.*, 686 F.2d 605 (7th Cir. 1982).

Termination of individual right of action following suit by the EEOC:

Burns v. *Equitable Life Assurance Society*, 696 F.2d 21.

Extraterritorial Application of the ADEA:

Cleary v. *United States Lines, Inc.*, 728 F.2d 607, 610 (3d Cir. 1984).

B. The FLSA Does Not Provide for Recovery of Damages Caused by Union Violations of § 15 of the FLSA.

The relevant substantive prohibitions of the FLSA may be briefly summarized. Sections 6(a), (b), (c), (e) and (f), 29 U.S.C. § 206(a), (b), (c), (e) and (f), require employers to pay their employees a minimum wage. Section 6(d) (the EPA) prohibits an employer from paying differing wages on the basis of sex, and prohibits labor organizations from causing or attempting to cause employers to discriminate on that basis.[22] Section 7, 29 U.S.C. § 207, regulates employer overtime compensation practices. Section 15(a)(2) makes it unlawful "for any person" to violate §§ 6 or 7, and § 15(a)(3) makes it unlawful "for any person" to retaliate against an employee for action relating to enforcement of the statute. 29 U.S.C. § 215(a)(2), (3). Thus, the FLSA governs the minimum wage and overtime practices of employers and the equal pay and retaliation practices of employers and labor organizations.

Four enforcement mechanisms are established. First, there are criminal sanctions under § 16(a) against "any person who willfully violates" any provision of § 15. 29 U.S.C. § 216(a). Second, an "employee" may bring an action under § 16(b) against "any employer" who violates §§ 6, 7, or 15(a)(3) (retaliation). 29 U.S.C. § 216(b). Third, the Secretary of Labor may bring an action under § 16(c) to recover amounts owing for violations of §§ 6 and 7. 29 U.S.C. § 216(c). Fourth, the "Administrator" may proceed under § 17 to restrain violations of § 15, including "the restraint of any withholding of payment of minimum wages or overtime compensa-

---

[22] Section 6(d)(2), 29 U.S.C. § 206(d)(2), provides that "[n]o labor organization . . . shall cause or attempt to cause such an employer to discriminate against an employee in violation of" the equal pay provisions in § 6(d)(1) of the FLSA, 29 U.S.C. § 206(d)(1).

tion" due as a result of violations of § 15(a)(2). 29 U.S.C. §§ 211(a), 217.

Under this remedial scheme, an "employer" which violates § 6 or § 7 of the FLSA is subject to criminal sanctions under § 16(a), employee actions under § 16(b), Secretary of Labor actions under § 16(c), and injunction proceedings by the Administrator under § 17. While a labor organization is included in the definition of "person," FLSA § 3a, 29 U.S.C. § 203(a), the term "employer" expressly excludes a "labor organization (other than when acting as an employer)," FLSA § 3(d), 29 U.S.C. § 203(d). Remedies against labor organizations are therefore limited to criminal penalties under § 16(a) for willful violation of § 15, and § 17 actions to enjoin violations of § 15. There is no right of action under § 16(b) or § 16(c) against a labor organization "other than when acting as an employer;" there is no basis to seek recovery of "unpaid minimum wages and overtime compensation" under § 17 from a union co-signatory to a collective bargaining agreement which violates § 15(a)(2) of the FLSA.

1. The EEOC has no right of action against ALPA under § 16(c).

Whether the EEOC may recover damages against ALPA under § 16(c) of the FLSA [20] turns on two questions of statutory construction: 1) whether the ADEA incorporates § 16(c) as it existed in 1967 or as subsequently amended in 1974; and 2) in any event, whether § 16(c) authorizes recovery of damages against labor organizations.

---

[20] Section 16(b) actions may only be brought by an "employee." Only "[t]wo of the incorporated [FLSA] sections, FLSA §§ 16(c) and 17, apply to actions brought by the Secretary of Labor on behalf of aggrieved individuals" to enforce the ADEA. *EEOC v. Gilberts, Inc.*, 615 F.2d 980, 988 (4th Cir. 1980).

a. FLSA § 16(c) must be construed as incorporated in the ADEA in 1967.

ADEA was enacted in 1967. Pub. L. No. 90-202, 81 Stat. 602 (1967). At that time § 16(c) of the FLSA authorized the Secretary of Labor to bring an action, on behalf of an employee who had made a written request to the Secretary, to recover unpaid minimum wages and overtime compensation, but not liquidated damages. 29 U.S.C. § 216(c) (1964 ed.), *amended by* Pub. L. No. 93-259, § 26, 88 Stat. 55, 77 (1974). Section 16(c) further deprived the courts of jurisdiction in any action by the Secretary "involving an issue of law which has not been settled finally by the courts." *Id.* In 1974 Congress amended § 16(c) to delete the requirement of a written request and the limitation as to issues "settled finally by the courts", and authorized the Secretary to secure liquidated damages in § 16(c) actions. Pub. L. No. 93-259, § 26, 88 Stat. 55, 73 (1974).

In the 1967 enactment of the ADEA, Congress incorporated the remedial scheme of the then existing FLSA, except for certain express modifications in § 7(b) of the ADEA.[21] *See Lorillard*, 434 U.S. at 582. The incorporation of a statute in a subsequent enactment " 'has always been considered as referring to the law existing at the time of adoption, and no subsequent legislation has ever been supposed to affect it; and such must necessarily be

---

[21] As enacted, § 7(b) states, in material part: "The provisions of this Act shall be enforced in accordance with . . . sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended. . . ." Pub. L. No. 90-202, § 7(b), 81 Stat. 602, 604 (1967). As codified, the references are to "sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title. . . ." 29 U.S.C. § 626(b). There is no express reference to the effect of subsequent amendments. *Cf. Pearce v. Director, Office of Workers' Compensation Programs*, 603 F.2d 763, 767 (9th Cir. 1979) (Defense Base Act, as originally enacted, incorporated the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, "as amended, and as the same may be amended hereafter . . .").

the effect and operation of such adoption.'" *In re Heath*, 144 U.S. 92, 94 (1892), *quoting Kendall* v. *United States*, 37 U.S. (12 Pet.) 524, 625 (1838). *Accord Hassett* v. *Welch*, 303 U.S. 303, 314 (1938).[20]

As TWA states, Congress has not expressed an intent to incorporate the post-1967 amendments to § 16(c) into the ADEA. TWA Br. at 37 n.49. Thus the EEOC could have no right of action under § 16(c) against ALPA, since the issues presented to this Court concerning the lawfulness under §§ 4(a) and 4(f)(1) of the ADEA of a retirement policy such as TWA's were not settled finally by the courts when the EEOC intervened in this action.[21] Moreover, the EEOC cannot recover liquidated damages against ALPA since § 16(c) did not authorize such damages in an action by the Secretary until the 1974 amendment. Section 16(c), as incorporated in the ADEA, provides no right of action for damages against ALPA.

> b. *Section 16(c) does not otherwise authorize recovery of damages against labor organizations.*

Even if Congress intended the 1974 amendment of the FLSA to be incorporated into the ADEA, § 16(c) still does not authorize recovery of damages against ALPA.

---

[20] The Court in *EEOC* v. *Chrysler Corp.*, 546 F. Supp. 54, 73-78 (E.D. Mich.), *aff'd on other grounds*, 733 F.2d 1146 (6th Cir. 1982), held that the 1974 amendments to § 16(c) were incorporated in the ADEA, based on its characterization of specific references to § 16 and § 17 of the FLSA as manifesting an intent "to incorporate the general FLSA enforcement scheme." Yet, the FLSA enforcement scheme is contained not only in § 16 and § 17 of the FLSA, but also in the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-262. In *Lorillard*, the Court noted that "the ADEA expressly incorporates §§ 6 and 11 of the Portal-to-Portal Act, [but] ADEA does not make any reference to § 11, 29 U.S.C. § 260" (which creates a "good faith" exception to the liquidated damages authorized in §§ 16(b) and § 16(c) of the FLSA). *See, e.g.*, *Goodman* v. *Heublein, Inc.*, 645 F.2d 127, 129-30 (2d Cir. 1981) and cases cited therein (holding that the ADEA does not incorporate 29 U.S.C. § 260).

[21] *See, e.g.*, *Wirtz* v. *Mercier*, 405 F.2d 938 (1st Cir. 1968).

Section 16(c) does not create any right of recovery on behalf of an employee beyond the recovery he could obtain in his own action under § 16(b).

> [A]n employee who is not paid minimum wages or overtime . . . may choose between action by the Administrator under [§ 16(c)] for simply the amount which is owed to him and his own individual right of action under [§ 16(b)] for both back wages and liquidated damages together with a reasonable attorney's fee.

S. Rep. No. 640, 81st Cong., 1st Sess., *reprinted in* 1949 U.S. Code Cong. & Ad. News 2241, 2249. "A suit under § 16(c), therefore, is essentially a representative action brought to enforce the private rights described in § 16(b)." *EEOC* v. *Corry Jamestown Corp.*, 719 F.2d 1219, 1221 (3d Cir. 1983). *See also Wirtz* v. *Jones*, 340 F.2d 901, 904 (5th Cir. 1965) ("[u]nder § 16(b) the employees may sue the employer for backpay, and under § 16(c) the Secretary . . . may bring the action").

Section 16(b) does not authorize an action against a labor organization. Although a union may violate § 15(a)(2) of the FLSA, by causing an employer to pay gender-discriminatory wages, § 16(b) only authorizes recovery of "unpaid minimum wages and overtime compensation" against an "employer." Under § 3(d) of the FLSA, the term "employer" "does not include any labor organization (other than when acting as an employer). . . ." Where a statute is unambiguous, the plain meaning of the statutory language governs. *See, e.g.*, *INS* v. *Phinpathya*, —— U.S. ——, 104 S.Ct. 584, 589 (1984).

Thus, shortly after the enactment of the FLSA, the court in *Brow* v. *Judson C. Burns, Inc.*, 137 F.2d 37 (3d Cir. 1943), held that § 16(a) of the FLSA (criminal sanctions) is applicable to a labor organization which

violates § 15(a)(3) (retaliation) because the latter provision is directed against "any person" (defined to include labor organizations, § 3(a), 29 U.S.C. § 203(a)). However, emphasizing that the FLSA is "carefully drawn and every term is used as a term of art," 137 F.2d at 38, the court noted that "[e]mployee actions may be maintained only under Section 16(b) to recover back wages and liquidated damages," *id.* at 39, and that § 16(b) "provides that an 'employer' who violates the wage and hour sections of the Act . . . shall be liable to the employee affected for unpaid wages and for damages." *Id.*

Every court to address the question has held that an employee injured by labor organization violations of § 15(a)(2) of the FLSA may not recover damages against labor organizations under § 16(b), based on the express terms of § 3(d) and § 16(b).[27] Prior to *Northwest Airlines*, 451 U.S. 77, the lower federal courts also rejected employers' claims for contribution from unions alleged to have jointly violated the EPA on the ground that § 16(b) of the FLSA does not authorize recovery of damages from unions.[28]

Whether or not the amendments to the FLSA subsequent to 1967 are deemed incorporated into the ADEA, they further demonstrate that Congress has at all times intended that damages under § 16 only be recovered from

---

[27] *Lyon* v. *Temple University*, 507 F. Supp. 671, 674-75 (E.D. Pa. 1981); *Cook* v. *Mountain States Telephone and Telegraph Co.*, 397 F. Supp. 1219, 1226 (D. Ariz. 1975); *Hunter* v. *United Air Lines, Inc.*, 10 Fair Empl. Prac. Cases (BNA) 787, 788 (N.D. Cal. 1975); *Toms* v. *American Can Co.*, 367 F. Supp. 1178, 1181 (D.N.J. 1973).

[28] *Lesinski* v. *G.C. Murphy Co.*, 562 F.2d 889, 894 (3d Cir. 1977); *West* v. *Northwest Airlines, Inc.*, 86 Lab. Cas. (CCH) ¶ 33,811, at 48,505 (W.D. Wash. 1979). *Cf. Northwest Airlines, Inc.* v. *Transport Workers Union*, 606 F.2d 1350, 1355 (D.C. Cir. 1979), *aff'd in part and vacated in part*, 451 U.S. 77 (1981).

an "employer" and not a union.[29] Until 1974, § 16(b) provided that "[a]n action to recover such liability [referring to liability of an "employer" who violates §§ 6 or 7] may be maintained in any court of competent jurisdiction. . . ." *See, e.g.*, 29 U.S.C. § 16(b) (1970). In the 1974 amendments, Pub. L. No. 93-259, 88 Stat. 55 (1974), Congress modified that sentence to read that the action "may be maintained against any employer (including a public agency). . . ."[30] Congress did not provide any § 16(b) remedy against labor organizations which caused private employers or public agencies to violate the statute. *See Hunter* v. *United Air Lines, Inc.*, 10 Fair Empl. Prac. Cases (BNA) 787, 788 (N.D. Cal. 1975).

Until 1977, there was no private right of action under § 16(b) for retaliation in violation of § 15(a)(3). *See, e.g.*, 29 U.S.C. § 216(b) (1976). In the 1977 FLSA amendments, Pub. L. No. 95-151, 91 Stat. 1245 (1977), Congress modified § 16(b) to provide a private action for retaliation.[31] Congress limited the new § 16(b) legal and equitable remedies to a private right of action against "any employer" which unlawfully retaliates against employees, *id.*, although previous case law had

---

[29] *See generally Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-81 (1969); *United States* v. *Stewart*, 311 U.S. 60, 64 (1940).

[30] The amended sentence of § 16(b) states: "[a]ctions to recover such liability may be maintained [against any employer (including a public agency)] in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves, and other employees similarly situated." (1974 additions in brackets). Pub. L. No. 93-259, § 6(d)(1), 88 Stat. 55, 61-62 (1974).

[31] The 1977 amendment to § 16(b) provides: "Any employer who violates the provisions of section 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement, promotion and the payment of wages lost, and an additional equal amount as liquidated damages." Pub. L. No. 95-151 § 10, 91 Stat. 1245, 1252 (1977).

denied any private right of action for damages under § 16(b) or for injunctive relief under § 17 against either an employer or a labor organization which violated § 15 (a)(3) of the FLSA,[20] and recent decisions had construed "employer" not to apply to labor organizations.[21] This omission confirms that the absence of a right of action against unions under § 16(b) or § 16(c) was not inadvertent. *See generally Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981) (no right to a jury trial under § 15 of the ADEA, 29 U.S.C. § 633a [federal employment]; § 7(c)(2) of the ADEA "*expressly* provides for jury trials," "[b]ut in § 15 [Congress] failed explicitly to do so.").

2. *Section 17 does not provide a remedy to recover money damages against unions which enter into collective bargaining agreements embodying unlawful employment practices.*

Section 17 of the FLSA, 29 U.S.C. § 217, allows the Secretary to secure injunctions to restrain violations of § 15, 29 U.S.C. § 215. Section 17 was amended in 1961 to authorize "the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act. . . ." Pub. L. No. 87-30, § 12(b), 75 Stat. 65, 82 (1961). The language, legislative history, judicial construction and administrative enforcement of § 17 do not "disclose a purpose to make the union jointly liable in damages, but rather to give the Secretary of Labor power to enjoin violations of the [FLSA] where a union is responsible, as

---

[20] *See, e.g., Martinez* v. *Bekins's Bearings Service, Inc.*, 501 F.2d 104 (5th Cir. 1974); *Powell* v. *Washington Post Co.*, 387 F.2d 631 (D.C. Cir.), *cert. denied*, 389 U.S. 930 (1969); *Brennan* v. *Elizabeth Arden, Inc.*, 177 F.2d 788 (2d Cir. 1949); *Brown* v. *Judson C. Burns, Inc.*, 197 F.2d at 38-39; *Britton* v. *Grace Line Inc.*, 214 F. Supp. 286 (S.D.N.Y. 1962).

[21] *Cook*, 297 F. Supp. 1215, *Hunter*, 10 Fair Empl. Prac. Cases (BNA) 787, and *Toma*, 347 F. Supp. 1178, were decided between 1973 and 1975; *Dominic*, 562 F.2d 680, was decided in 1977. *See supra* at p. 24 nn.27, 28.

well as power to enjoin employers from future violations and require payment for past ones." *Wirtz* v. *Hayes Industries, Inc.*, 1 Empl. Prac. Dec. (CCH) ¶ 9974, at 1090 (N.D. Ohio 1968).

> Because "employers," and not unions, can be liable to employees under the FLSA for unpaid minimum wages or overtime compensation, it follows that only "employers" are capable of wrongfully withholding such funds from employees. Therefore, only "employers" may be restrained from engaging in such withholding.

Newman v. *Northwest Air Lines, Inc.*, 28 Fair Empl. Prac. Cases (BNA) at 1490-91.

The legislative history of the 1961 amendments to § 17 demonstrates that Congress had two purposes for this enactment:

> First, the restraint was meant to increase the effectiveness of the enforcement of the Act by depriving a violator of any gains accruing to him through his violation. Second, the amendment was meant to protect those employers who comply with the Act from having to compete unfavorably with employers who do not comply. (Senate Report No. 145, 87th Cong., First Session. 1961; 1962 U.S. Code Cong. & Admin. News 1620 at 1658-1659).

Wirtz v. *Malthor, Inc.*, 391 F.2d 1, 3 (9th Cir. 1968).[22] Both of these Congressional purposes seek to redress the competitive advantage gained by an employer by engaging in violations of the Act. Neither presents a rationale for holding unions liable for back wages wrongfully withheld. Indeed, permitting the employer to shift any part of its liability to the union "would subvert the congres-

---

[22] *Accord Donovan* v. *Sovereign Security, Ltd.*, 726 F.2d 55 (2d Cir. 1984); *Donovan* v. *Brown Equipment and Service Tools, Inc.*, 666 F.2d 148, 156-57 (5th Cir. 1982); *Hodgson* v. *American Can Co.*, 440 F.2d 916 (9th Cir. 1971); *Marshall* v. *A & M Consolidated Independent School District*, 605 F.2d 186, 189 (5th Cir. 1979).

sional policies sought to be advanced." *Brennan v. Emerald Renovators, Inc.*, 410 F.2d 1057, 1061 (S.D.N.Y. 1975). *Accord EEOC v. Ferris State College*, 493 F. Supp. 707, 716 (W.D. Mich. 1980). Moreover, to construe § 17 to authorize recovery against unions for discriminatory policies embodied in collective bargaining agreements would create different economic risks for unionized and non-unionized employers who violate § 15 of the FLSA, as employees of unionized employers could proceed against the union for damages.[28]

The lower federal courts have routinely rejected contribution claims in § 17 actions by employer-defendants against unions which signed collective bargaining agreements that violate the equal pay provisions of the FLSA, because such claims are inconsistent with the language and purposes of § 17.[29] With a single exception, neither the Secretary of Labor nor the EEOC have brought § 17 actions against labor organizations to recover damages under the EPA or FLSA.[30] The principle that the Secre-

---

[28] *Cf. Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 710 (1945) (holding that employee waiver of liquidated damages claims were inconsistent with statutory goals of eliminating economic incentives for statutory violations: "An employer is not to be allowed to gain a competitive advantage by reason of the fact that his employees are more willing to waive claims for liquidated damages than are those of his competitors.").

[29] *EEOC v. Ferris State College*, 493 F. Supp. 707, 716-17 (W.D. Mich. 1980); *Marshall v. Pombo Janitorial Service, Inc.*, 92 Lab. Cas. (CCH) ¶ 33,550 (W.D. Mo. 1977); *Cleary v. Beloit College*, 22 Empl. Prac. Dec. (CCH) ¶ 11,208 (W.D. Wis. 1979); *Dunlop v. Beloit College*, 411 F. Supp. 808 (W.D. Wis. 1976); *Brennan v. Emerald Renovators, Inc.*, 410 F. Supp. 1057 (S.D.N.Y. 1975); *Wirtz v. Hayes Industries, Inc.*, 1 Empl. Prac. Dec. (CCH) ¶ 9874 (N.D. Ohio 19[illegible]). *Cf. Murphy v. Miller Brewing Co.*, 307 F. Supp. 829 (E.D. Wis. 1969), *aff'd sub nom. Hodgson v. Miller Brewing Co.*, 457 F.2d 221 (7th Cir. 1972) (union agreement to labor contract containing non-discriminatory provisions does not state a claim for violation of 29 U.S.C. § 206(d)(2)).

[30] The only reported case in which the Secretary sought to obtain a monetary remedy from a labor organization invoked the general

tary of Labor may obtain an injunction under § 17 against "any person" who violates the Act, but may only recover "unpaid wages and overtime compensation" from an "employer", has also been recognized outside the context of actions against labor organizations. In *Wirtz v. Pure Ice Co.*, 322 F.2d 259 (8th Cir. 1963), the court affirmed both the entry of an injunction against an owner of a corporation for violations of the FLSA, and the denial of a judgment for unpaid wages against him, based on a finding that the owner was not an "employer" within the meaning of § 3(d) of the FLSA, 29 U.S.C. § 203(d).

In any event, if § 17 were construed to authorize recovery of "unpaid minimum wages and overtime compensation" from both parties to a collective bargaining agreement, liquidated damages are not available in a § 17 ac-

---

equitable powers of the court, rather than a construction of the scope of § 17. In *Hodgson v. Sapper, Inc.*, 328 F. Supp. 371, 374 (D. Md. 1971), *aff'd sub nom. Hodgson v. Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972), the court awarded the Secretary of Labor monetary relief against a union based solely on its outrageous conduct in insisting that an employer divert to the male employees part of the back pay which it had agreed to provide to female victims of discrimination.

In *Northwest Airlines*, 451 U.S. 77, the EEOC argued that its remedies for union violations of the EPA are injunctive relief and "in flagrant cases . . . a Commission suit for damages." EEOC Br. in *Northwest Airlines* at 18, *citing Hodgson v. Sapper, Inc.* The EEOC characterized *Sapper* as a case in which "the employer had disgorged the funds unlawfully withheld and was no longer at a competitive advantage, and the fund was misdirected at the union's insistence." *Id.*

Subsequent decisions have consistently declined to read *Sapper* to establish joint liability under § 17 on the part of labor organizations for recovery of unpaid minimum wages and overtime compensation resulting from unlawful collective bargaining agreements. *Northwest Airlines*, 696 F.2d at 1556; *Dominic v. G.C. Murphy Co.*, 643 F.2d at 964; *EEOC v. Ferris State College*, 493 F. Supp. at 716-17; *Brennan v. Emerald Renovators, Inc.*, 410 F. Supp. at 1062; *Dunlop v. Beloit College*, 411 F. Supp. at 808.

tion for enforcement of the FLSA or the ADEA. S. Rep. No. 145, 97th Cong., 1st Sess. (1981), *reprinted in* 1982 U.S. Code Cong. & Ad. News 1620, 1639. *See EEOC* v. *Gilbarco, Inc.*, 615 F.2d 985, 988, 991 (4th Cir. 1980) (ADEA); *Donovan* v. *Brown Equipment and Service Tools, Inc.*, 666 F.2d 148, 156 (5th Cir. 1982) (FLSA). *Cf. Wilkes* v. *United States Postal Service*, 549 F. Supp. 642 (N.D. Ill. 1982) (no liquidated damages in federal employee action pursuant to § 15 of the ADEA, 29 U.S.C. § 633a).

C. Section 7(b) of the ADEA Does Not Provide Monetary Remedies in Addition to those Expressly Authorized by the FLSA.

The "selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that, but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA." *Lorillard*, 434 U.S. at 582.[39] *Accord EEOC* v. *Gilbarco, Inc.*, 615 F.2d at 987-88 n.1. The creation of a damages remedy against unions is not one of the express modifications to the FLSA remedies enacted in the ADEA.[40]

---

[39] The Court noted in *Lorillard* that Congress made three changes in incorporating FLSA remedies into § 7(b) of the ADEA. First, Congress provided equitable relief to employees which was only available in an action by the Secretary under § 17 of the FLSA. 434 U.S. at 580. Second, liquidated damages were restricted to cases of willful violations of the ADEA, in contrast to the automatic award of liquidated damages in a § 16(b) action under the FLSA, which is subject only to the "good faith" defense provided in § 11 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 260. *Id.* at 581 & n.8. Third, the criminal sanctions in § 16(a) of the FLSA, applicable to "any person" who violated § 15 of the act, were deleted from the ADEA. *Id.* at 582.

[40] When Congress has intended to modify the scope of the remedies available against a party in an incorporated statute, it has expressly manifested its intent to do so. For example, in Section 7(a) of the 1978 amendments to Title IV of the Federal Coal Mine

TWA appears to suggest that the general "legal or equitable relief" language in § 7(b)[41] should be read to imply a remedy for recovery of money damages against unions. TWA Br. at 39-40. Yet, § 7(b) expressly defines the monetary remedies for injuries caused by ADEA violations in terms of the remedies provided in § 16 and § 17 of the FLSA: "[a]mounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation *for purposes of sections 216 and 217 of this title* . . . ." 29 U.S.C. § 626(b) (emphasis added).

In *Lorillard*, the Court read the reference to "legal relief" to refer specifically "to judgments 'enforcing . . . liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation,'" 434 U.S. at 583 n.11, *quoting* 29 U.S.C. § 626(b). As TWA admits, "[t]he reference . . . to 'unpaid minimum wages or unpaid overtime compensation' relates to language in the FLSA which has been specifically incorporated into Section 7(b)

Health and Safety Act of 1969, 30 U.S.C. §§ 801-962 (The Black Lung Benefits Reform Act of 1977) ["Reform Act"], Pub. L. No. 95-239, 92 Stat. 95 (1978) (codified at 30 U.S.C. §§ 901-945). Congress incorporated the remedial scheme of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950, but expressly modified the references to "employer" in the LHWCA to refer to the trustees of the black lung benefits fund. By this substitution of the trustees for the employer, Congress made available an attorney's fees remedy against the fund in black lung benefit claim cases that had not been expressly authorized in LHWCA claim cases. *Compare Director, Office of Workers' Compensation Programs* v. *Black Diamond Coal Mining Co.*, 598 F.2d 945, 948-49 (5th Cir. 1979) *with Director, Office of Workers' Compensation Programs* v. *Robertson*, 625 F.2d 873, 877 n.6 (9th Cir. 1980).

[41] "[A] court 'shall have jurisdiction to grant *such legal or equitable relief as may be appropriate to effectuate the purposes of this Act*, including . . . enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.'" TWA Br. at 39-40, *quoting* 29 U.S.C. § 626(b) (emphasis and deletions in original).

of the ADEA." TWA Br. at 40. The Court in *Lorillard* further read § 7(b) as a direction by Congress "that actions for lost wages under the ADEA be treated as actions for unpaid minimum wages or overtime compensation under the FLSA." 434 U.S. at 582. The Court concluded that the reference to "equitable" jurisdiction in § 7(b) was intended to provide equitable remedies in private ADEA actions which were not available in FLSA suits by private individuals, 434 U.S. at 581, rather than as an additional source of "legal relief".[41]

Lower federal court decisions have similarly construed "legal relief" in § 7(b) in terms of the "definition of amounts owing as unpaid minimum wages or unpaid overtime compensation" in § 7(b) and "the reference to sections 216 and 217 of [this] chapter. . . ." *Pfeifer* v. *Essex Wire Corp.*, 682 F.2d 684, 686 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982). Thus, in *Johnson* v. *Al Tech Specialties Steel Corp.*, 731 F.2d 143 (2d Cir. 1984), the court declined to read the reference to "legal relief" as "expansive remedial authority," but rather held the provisions deeming " 'amounts owing as a result of a violation [of the ADEA] . . . to be unpaid . . . wages' " "to be dispositive of the drafter's intention" not to provide monetary remedies in § 7(b) in addition to those provided in the FLSA.

---

[41] The "equitable" relief available under § 7(b) of the ADEA does not create a right to recover backpay. In *Lorillard*, this Court concluded that Congress manifested an intent to provide a right to a jury trial by creating a "legal" remedy for lost wages under § 16(b) of the FLSA (which had been construed to provide a right to a jury trial) rather than an equitable "backpay" remedy analogous to Title VII or § 17 of the FLSA (which had been construed not to provide a right to a jury trial in actions to recover lost wages). *Lorillard*, 434 U.S. at 580 n.7. Indeed, the court in *Novelock* v. *NCR Corp.*, 546 F.2d 682, 688 (6th Cir. 1976), *vacated and remanded*, 435 U.S. 911 (1978), had erroneously concluded that a jury trial was not permitted in a private ADEA action, based on its determination that the ADEA created an equitable backpay remedy rather than a legal remedy.

> [T]he more expansive grant of judicial authority ["such legal or equitable relief"] permits courts in their discretion to supplement back pay awards with injunctive relief, orders of reinstatement or promotion, or similar non-monetary remedies designed to "effectuate the purposes of [the ADEA]"; 29 U.S.C. § 626(b).

731 F.2d at 147."

In any event, even if § 7(b) could be read to provide broader remedies enforcing liability for unpaid minimum and overtime compensation than are available under the FLSA, there is no indication of an intent to expand the *parties* liable for such relief. The grant of jurisdiction to confer "legal or equitable" relief does not support this construction of § 7(b). TWA's argument in reliance on this general language simply goes too far, as it would authorize the courts to grant relief without regard to what is expressly provided in §§ 16 or 17 of the FLSA. This reading of the grant of jurisdiction in the fourth sentence in § 7(b) would render the first three sentences of § 7(b) almost completely superfluous, contrary to the determination in *Lorillard* concerning the "selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices." 434 U.S. at 583.

Ultimately, TWA argues that there is no indication in the legislative history of the ADEA that Congress specifically addressed the issue of remedies for union violations of the ADEA, and that such Congressional silence, in the context of express prohibitions of union violations, is suf-

---

[42] *See also Fiedler* v. *Indiahead Truck Line, Inc.*, 670 F.2d 806, 810.; *Vasquez* v. *Eastern Airlines, Inc.*, 579 F.2d 107; *Dean* v. *American Security Insurance Co.*, 559 F.2d 1036. *But see EEOC* v. *Air Line Pilots Association, International*, 489 F. Supp. at 1009, holding that the EEOC could recover backpay against ALPA, based on a reading of the general "legal or equitable relief" language in § 7(b) to supersede the "reference in § 626(b) to the FLSA."

ficient to authorize damages remedies. Whatever force that argument may have with respect to statutes where Congress has merely enacted a substantive regulation and left the development of remedies and procedures to the courts, it is unavailing where Congress has manifested its intent to have the courts apply the comprehensive remedies and procedures of an incorporated statutory scheme.[40] By its express incorporation of the remedial scheme of the FLSA into the ADEA, Congress plainly manifested its intent to make § 16 and § 17 of the FLSA the measure of monetary remedies available in ADEA actions. *See Lorillard*, 434 U.S. at 582; *Newman* v. *Northwest Airlines*, 28 Fair Empl. Prac. Cases (BNA) at 1489. Section 7(b) does not create an additional damages remedy against unions.[41]

---

[40] In *La Chapelle* v. *Owens-Illinois*, 513 F.2d 286 (5th Cir. 1975), the Court rejected the argument that the "written consent" requirement for participation in class actions authorized by § 16(b) of the FLSA should not be incorporated in § 7(b) in the absence of a discussion of that issue in the legislative history of ADEA, so as to best effectuate the purposes of the ADEA. 513 F.2d at 289.

> Had Congress desired to read out the [written consent requirement in] the third sentence [of § 16(b)] it could have done so. It has not, and we may not. Any argument that the inclusion of the consent requirement undercuts th broad remedial purposes of ADEA should be made to the legislature and not to the courts.

513 F.2d at 289 n.10.

[41] In describing the provision in the 1978 ADEA amendments expanding the right to a jury trial recognized in *Lorillard*, the House Conference Committee Report reaffirmed that Section 7(b) of the ADEA "incorporates the remedial scheme of Sections 11(b), 16 and 17 of the FLSA," and referred to FLSA caselaw to explain the concept of ADEA liquidated damages. H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 13-14, *reprinted in* 1978 U.S. Code Cong. & Ad. News 529, 533. These references to the legal remedies provided in FLSA actions, at a time subsequent to lower court decisions construing § 16 and § 17 of the FLSA not to provide monetary remedies against labor organizations, are additional evidence that the remedies available in ADEA actions are limited to those provided in § 16 and § 17 of the FLSA absent a specific express modification of that FLSA remedial scheme in the ADEA. *Cf. Pfeifer* v. *Essex Wire Corp.*, 681 F.2d at 687 (finding the legislative history of the 1978 ADEA amendments "highly persuasive, if not dispositive" of Congressional intent to disallow damages beyond what is provided in the remedial scheme of the FLSA). *Accord Brin* v. *Stipsky and Krutchen*, 19 Fair Empl. Prac. Cases (BNA) 413 (N.D. Ill. 1979).

D. The Policy Considerations Offered by TWA Do Not Justify Judicial Fashioning of Additional ADEA Remedies against Labor Organizations.

Unlike § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), on which TWA and employer *amici* rely, neither § 7(b) of the ADEA, nor § 15 and § 17 of the FLSA, expressly provide for monetary relief against a union. This fundamental difference undercuts TWA's suggestion that this Court need only take into account that the substantive prohibitions against union violations in § 4(c) of the ADEA are identical to the prohibitions in § 703(c) of Title VII, 42 U.S.C. § 2000e-2(c), and that the general language concerning appropriate legal and equitable relief in § 7(b) of the ADEA is analogous to general remedial language in § 706(g) of Title VII. Moreover, as this Court specifically emphasized in *Lorillard*, "rather than adopting the procedure of Title VII for ADEA actions, Congress rejected that course in favor of incorporating the FLSA procedure even while adopting Title VII's substantive provisions." 434 U.S. at 584-85.[42]

TWA's analogy to remedies under the judicially implied duty of fair representation is likewise misplaced. As this Court emphasized in holding that punitive damages are not available against a union which breaches its duty of fair representation:

---

[42] "[T]he very different remedial and procedural provisions under the ADEA [as contrasted to Title VII] suggest that Congress had a very different intent in mind in drafting the later law." *Lorillard*, 434 U.S. at 585 n.14.

> We are concerned here with judicially created remedies for a judicially implied cause of action. Whether the explicit statutory language of [other statutes] and [their] accompanying legislative history authorize punitive damages awards obviously involves different considerations.

International Brotherhood of Electrical Workers v. *Foust*, 442 U.S. 42, 47 n.9 (1979). The role of the federal courts in creating remedies under the duty of fair representation is "fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." *Northwest Airlines*, 451 U.S. at 97. "[W]hen Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement," such as the EPA or the ADEA, "[t]he judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs." *Id.*

TWA and employer *amici* further suggest that the policies of the federal labor laws so unambiguously favor judicial recognition of a damages remedy against a labor organization in an ADEA action as to override the express Congressional intent to incorporate the remedies provided in § 16 and § 17 of the FLSA. The fallacy in the overall analysis is demonstrated by TWA's final argument that union liability for liquidated damages "follows *a fortiori*" from the "principle of monetary liability."[46] TWA Br. at 43 n.30. The statutory schemes on which TWA relies (Title VII; the Labor Management Relations Act, 29 U.S.C. §§ 141-187; and the Railway Labor Act, 45 U.S.C. §§ 151-188) to establish an abstract "principle of monetary liability" do not provide for liquidated

[46] A "principle of monetary liability" only exists within the context of the statute which creates the prohibition on which that remedy is based. *See Texas Industries, Inc.* v. *Radcliff Materials*, 451 U.S. 630, 642-45 (1981); *Northwest Airlines*, 451 U.S. at 97.

damages remedy. It is absurd to suggest that the federal courts could declare that backpay awards under Title VII can include liquidated damages because Title VII and the ADEA share "'important similarities . . . in their aims and in their substantive prohibitions.'" TWA Br. at 42, *quoting Lorillard*, 434 U.S. at 584. This Court has flatly declined any such invitation to engage in judicial legislation in the guise of statutory construction. *Northwest Airlines*, 451 U.S. at 97.

It is for Congress to determine the scope of relief for violations of the prohibitions it enacts, and to strike the balance between those remedies which will most precisely further compliance and those that will overly harm legitimate competing values.[47] The different statutory schemes implicated in this case reflect various Congressional resolutions of these issues. In the FLSA, Congress made it unlawful for employers, but not labor organizations, to enter into collective bargaining agreements which violate § 6(a) and § 7 of that Act,[48] and provided for recovery of unpaid wages as well as double damages and criminal sanctions as remedies. Title VII creates an express backpay remedy against employers and labor organizations which violate the Act, but it makes the back-

[47] *See generally, Texas Industries*, 451 U.S. at 638, 637 (determining "whether sharing of damages liability will advance or impair the objectives of the antitrust laws" requires consideration of the "problem of 'overdeterrence,' i.e., the possibility that severe antitrust penalties will chill wholly legitimate business agreements.")

[48] The FLSA, which was designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive "'[a] fair day's pay for a fair day's work'" and would be protected from "the evil of 'overwork' as well as 'underpay,'" *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981), prohibits employers, but not unions, from entering into collective bargaining agreements contrary to § 6 and § 7 of the FLSA. 450 U.S. at 740-41, and cases cited therein.

III. ASSUMING THERE IS A VIOLATION OF THE ADEA HERE, A CO-DEFENDANT UNION SHOULD BE JOINTLY LIABLE WITH THE EMPLOYER FOR MONETARY RELIEF

A. The Holding of the Court Below

In a dramatic about-face, the majority first held ALPA jointly liable with TWA for "back pay, an equitable remedy" (A-34), and then, after denying petitions for rehearing, it issued a terse "Errata Sheet" *deleting* all references to ALPA's liability for monetary relief (A-37 to A-39). In its "corrected" decision, the Second Circuit holds that "the ADEA . . . does not permit actions to recover monetary damages, including back pay, against a labor organization." (A-38). It thus becomes the first Circuit Court to hold employers *solely* liable for monetary relief under the ADEA even where, as here, a co-defendant labor organization is found also to have violated the statute.[50]

The changed holding below receives no support in the language and purpose of the ADEA to provide employee

50 Only two reported district court decisions have squarely addressed the issue, with different results. In *EEOC* v. *ALPA*, 489 F. Supp. 1003, 1009 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981), the court relied on the language of 29 U.S.C. § 626(b) and "analogous case law under Title VII" in reaching its holding that a "union as well as employer can be held liable for backpay awards." A contrary result obtained in *Newman* v. *Northwest Airlines, Inc.*, 28 FEP Cases 1488, 1491 (N.D. Ill. 1982).

The majority's "Errata Sheet" added as authority for its holding a citation to *Brennan* v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057, 1059 n.5 (S.D.N.Y. 1975). That case, however, dealt not with the ADEA but with the Equal Pay Act, 29 U.S.C. § 206(d), and simply held that an employer could not maintain a private cause of action against a labor organization for contribution or indemnity.

The *Brennan* holding was subsequently adopted by this Court in *Northwest Airlines, Inc.* v. *TWU*, 451 U.S. 77 (1981), but the question of contribution continues to be inapposite to whether a co-defendant union can be held accountable for monetary liability under the ADEA. See, *e.g.*, *id.* at 88-89 n.20 ("we need not and do not decide the question whether employees have an implied right of action for back pay against their unions for violations of the Equal Pay Act").

redress from both labor organizations and employers by giving courts broad power "to grant such legal or equitable relief as may be appropriate" (29 U.S.C. § 626(b)). The decision is also inconsistent with "[t]he governing principle" of national labor policy "to apportion liability between the employer and the union according to the damage caused by the fault of each." *Vaca* v. *Sipes*, 386 U.S. 171, 197 (1967). Finally, without any support in the legislative history, the holding below attributes to Congress an intent to shield unions from monetary liability for the natural consequences of their discriminatory acts. It thereby frustrates the paramount "make whole" remedial concept of employment discrimination law.

B. The Holding Urged by Petitioner Is Supported by the Clear Purposes of the ADEA

The overriding purposes of the ADEA are "to promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age discrimination in employment" (29 U.S.C. § 621(b)). To effectuate these purposes, the ADEA contains a number of specific provisions expressly prohibiting age-based conduct by unions.[51]

The enforcement provision of the ADEA, Section 7(b), 29 U.S.C. § 626(b), contains no language absolving labor organizations from monetary liability for this prohibited conduct. Rather, that section broadly provides *that a court* "shall have jurisdiction to grant *such legal* or equitable relief as may be appropriate to effectuate the purposes *of this Act*, including . . . enforcing the liability for amounts deemed to be unpaid

51 For example, Section 4(c) of the ADEA provides that "[i]t shall be unlawful" for a labor organization "to discriminate against . . . any individual because of his age" or "to cause or attempt to cause an employer to discriminate against an individual in violation of this section." (29 U.S.C. § 623(c)). Labor organizations are further prohibited from retaliating against employees or applicants who exercise their ADEA rights (Section 4(d), 29 U.S.C. § 623(d)), and from making age-based distinctions in advertising or referrals for employment. Section 4(e), 29 U.S.C. § 623(e). In addition, labor organizations are required under Section 8, 29 U.S.C. § 627, to post ADEA notices advising individuals of their rights.

minimum wages or unpaid overtime compensation . . ." Since the purposes of the statute include prohibitions on age-based actions by labor organizations, it is only logical that Congress intended Section 7(b) to include union monetary exposure in appropriate cases. As noted in *EEOC* v. *ALPA*, *supra*, 489 F. Supp. at 1009:

> "It would not effectuate the purposes of the ADEA to allow unions to violate the Act without having to be concerned with being held liable for any resulting monetary damages."[52]

The reference in the ADEA to "unpaid minimum wages or unpaid overtime compensation" relates to language in the FLSA which has been specifically incorporated into Section 7(b) of the ADEA. It was this language which convinced the court in *Neuman*, *supra*, 28 FEP Cases at 1491, that monetary damages from a union were not available under the ADEA. However, such selectivity in the FLSA should not be applied woodenly to bar monetary recovery against a union when Section 7(b) expressly "grant[s] such legal or equitable relief as may be appropriate to effectuate the purposes of *this* Act," not the FLSA.

In this regard, it must be recognized that the purposes of the FLSA differ substantially from those of the ADEA. As the court said in *Usery* v. *Pilgrim Equipment Co.*, 527 F.2d 1308, 1310 (5th Cir.), *cert. denied*, 429 U.S. 826 (1976):

> "The purpose of the FLSA is to 'eliminate low wages and long hours' and 'free commerce from the interferences arising from production of goods under conditions that were detrimental to the health and well-being of workers.' "

52 See A-31 to A-33 for a discussion of what the majority viewed as the union's culpability here. In the face of such findings, the "Errata Sheet" may have removed monetary liability from ALPA, but it did not alter the majority's holding that "[w]hen a union becomes a party to a discriminatory provision in a collective bargaining agreement binding the employer to an unlawful practice, the union's conduct in aiding and abetting the employer to discriminate against employees renders it independently liable for violation of the ADEA, 29 U.S.C. § 623(c)(3)." (A-32).

Such purposes obviously limit the applicability of the FLSA to unions. It explains why it is only logical for some of the remedies under the FLSA to differ from those of the ADEA.[53]

In addition, the legislative history of the bill that became the ADEA, S. 830, *supra*, p. 34, clearly indicates that Congress deemed the statute equally applicable to employers and unions. For example, Senator Yarborough, in introducing the legislation, specifically noted that "[t]he bill's prohibitions against arbitrary employment practices harmful to older persons are directed against employers, *labor organizations*, and employment agencies." 113 Cong. Rec. 2467 (1967). See also the remarks of Representative Perkins (the bill "makes it illegal for . . . *a labor union* . . . to discriminate . . . because of his age") (*id.* at 34,740); and the remarks of Representative Kelly ("[t]he prohibitions in the bill would apply to employers, employment agencies, and *labor organizations*") (*id.* at 34,743).

Nowhere in the ADEA's legislative history is there any indication that Congress intended these clear prohibitions to be without the "teeth" of potential monetary exposure.[54]

C. Holding Unions Responsible for Monetary Liability Under the ADEA Would Be Consistent With Other National Labor Laws

Analogous support for holding unions liable can be drawn from case law under Title VII where unions as well as employ-

53 *Cf. Usery* v. *Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977), where the scope of the Equal Pay Act, which is "housed in" the FLSA, was viewed as different from the FLSA because the Equal Pay Act "is a separate law, enacted at a different time, and aimed at a separate problem . . ." The same should be true of the ADEA here.

54 Accord, *EEOC* v. *ALPA*, *supra*, 489 F. Supp. at 1009 n.5 ("ALPA has cited the court to nothing in the legislative history of the ADEA suggesting unions should be immune from damages liability, and the court also has found no such indication in the Act's legislative history . . .").

ers can be held liable for monetary relief.[55] These two statutes, sharing as they do "important similarities . . . in their aims . . . and in their substantive prohibitions," *Lorillard* v. *Pons*, *supra*, 434 U.S. at 584, "should be interpreted" here "*pari passu*." *Northcross* v. *Memphis Board of Education*, 412 U.S. 427, 428 (1973).

In addition, holding unions liable for monetary relief under the ADEA would be consistent with other important national labor laws. It is well-established, for example, that under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, an employee who proves that the employer violated a labor agreement and that the union breached its duty of fair representation is entitled to recover damages from both the union and the employer "according to the damage caused by the fault of each." *Vaca* v. *Sipes*, *supra*, 386 U.S. at 197.[56] This is similarly true under the RLA, where each party can be held to bear the damages attributable to its fault. See, *e.g.*, *Czosek* v. *O'Mara*, 397 U.S. 25, 29 (1970) ("judgment against [the union] can . . . be had . . . for those damages that flowed from [its] own conduct").[57]

---

55 See, *e.g.*, *Sears* v. *Atchison, T. & S.F. Ry.*, 645 F.2d 1365, 1374-77 (10th Cir. 1981), *cert. denied*, 456 U.S. 964 (1982); *Donnell* v. *General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978); *Russell* v. *American Tobacco Co.*, 528 F.2d 357, 366 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

56 This principle was recently reaffirmed by this Court in *Bowen* v. *United States Postal Serv.*, ___ U.S. ___, 103 S. Ct. 588 (1983), which held that where a union refuses to go to arbitration and is found to have breached its duty of fair representation, the union is liable for monetary damages that accrue after a hypothetical date on which an arbitrator would have issued an award.

57 See also *Hodgson* v. *Sagner, Inc.*, 326 F. Supp. 371, 373-74 (D. Md. 1971), *aff'd sub nom. Hodgson* v. *Baltimore Regional Joint Bd.*, 462 F.2d 180 (4th Cir. 1972), where, as here, the union was a co-defendant with the employer, and both were held liable for money damages under the Equal Pay Act, 29 U.S.C. § 206(d).

Given the substantial role that unions play in many activities subject to challenge under the ADEA, no reason exists why the *Vaca* principle of apportionment should not obtain under the ADEA. Apart from the circumstances here, myriad situations exist wherein employers and unions could be jointly challenged under the ADEA.[58] This is particularly true where the dispute centers on provisions in a collective bargaining agreement (by definition a joint employer/union endeavor). Without the spectre of monetary exposure, the "interest in deterring future [unlawful acts] by the union," *Bowen*, *supra*, 103 S. Ct. at 597 n.16, is meaningless.[59]

D. Holding Unions Accountable Is Consonant With the "Make Whole" Remedial Concept of Employment Discrimination Law

The ADEA shares with Title VII the purpose "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975).[60] This is "shown by the very fact that

---

58 For example, a district court recently held that an EEOC interpretation allowing age restrictions on apprenticeship programs was unlawful. *Quinn* v. *New York State Elec. & Gas Corp.*, 569 F. Supp. 655 (N.D.N.Y. 1983). If adopted elsewhere, all age-restrictive apprenticeship programs (so often the product of union and employer negotiations) are fair game for attack. Yet, under the decision below, only the employer faces monetary liability.

59 Moreover, if a union is held liable for back pay, such a back pay award should include liquidated damages which are, after all, "*equal to* the pecuniary losses sustained by way *of lost wages*." (A-33). Once the principle of monetary liability is established against a union, it follows *a fortiori* that such monetary liability includes liquidated damages provided that a union is guilty of a "willful" violation of the ADEA. Accordingly, if this Court decides that a union can be held liable for monetary relief, it should declare that such monetary relief can include liquidated damages.

60 See, *e.g.*, *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1243 & 1238 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) ("The make-whole relief objective is common to both Title VII and ADEA" and "should be the touchstone for the district courts in fashioning both legal and equitable remedies in age discrimination cases").

Congress took care to arm the courts" (*id.*) with broad power "to grant such legal or equitable relief as may be appropriate" (29 U.S.C. § 626(b)). As with Title VII, back pay has an "obvious connection" (422 U.S. at 417) with the mandate to eliminate age discrimination, a mandate Congress must have intended for employers and unions alike. As this Court stated in *Albermarle*:

> "It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and *unions* to self-examine and to self-evaluate their employment practices' . . ." (*id.* at 417-18).[61]

Logic alone dictates that if both parties are liable, they should be held accountable to the degree they are each culpable. That is certainly not the case now. The employer defendant is stuck with *total* monetary liability even though it is conceded by everyone that the statutory prohibitions in the ADEA apply just as equally to the union defendant.

Moreover, under the decision below, a plaintiff is left totally without an adequate remedy when a union *alone* has been found to have violated the ADEA. In a very real sense, the "make whole" cornerstone of employment discrimination law is thereby stripped of all meaning. Assuming there is liability here, this Court should eliminate the obvious inequity and anomaly which result from the holding below.

---

61 *See also Hodgson v. Sagner, Inc.*, *supra*, where, in rejecting a union's contention that it should not be jointly liable for monetary relief under the Equal Pay Act, the court stated:

> "If [the union's] position were correct, a union which had caused an employer to illegally withhold wages from its employees would be subject to no more than future restraint. Its past violation of the law would go uncorrected and unpunished; it could merely be prevented from breaking the law in the future. There is no apparent reason why a union which violates Section 206(d) should be treated any differently from an employer violator." (326 F. Supp. at 373).

CONCLUSION

Because TWA's policy was in compliance with the ADEA, the judgment of the United States Court of Appeals for the Second Circuit should be reversed. However, in the event that this Court finds liability under the ADEA, it should remand to the Second Circuit for instructions to the district court (i) to determine whether defendants' actions were a "willful" violation of the ADEA consistent with the definition adopted by this Court and (ii) for any further proceedings to determine the extent to which the co-defendant union should be liable for money damages under the ADEA.

Respectfully submitted,

HENRY J. OECHLER, JR.
30 Rockefeller Plaza
New York, N.Y. 10112
(212) 541-5800
Counsel of Record for
Trans World Airlines, Inc.

DONALD I STRAUBER
PETER N. HILLMAN
CHADBOURNE, PARKE, WHITESIDE
& WOLFF
Of Counsel

May 17, 1984

RESPONDENT'S

BRIEF

CORRECTED COPY

Office-Supreme Court, U.S.
FILED
JUL
6 1984

Nos. 83-997 and 83-1325

In the Supreme Court of the United States

OCTOBER TERM, 1984

TRANS WORLD AIRLINES, INC., PETITIONER

v.

HAROLD H. THURSTON, ET AL.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, PETITIONER

v.

HAROLD H. THURSTON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

REX E. LEE
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

HARRIET S. SHAPIRO
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOHNNY J. BUTLER
General Counsel (Acting)

PHILIP B. SKLOVER
Associate General Counsel

SUSAN BUCKINGHAM REILLY
Acting Assistant General Counsel

JEFFREY BANNON
STEPHEN O'ROURKE
Attorneys
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTIONS PRESENTED

1. Whether Trans World Airlines (TWA) violated the Age Discrimination in Employment Act by involuntarily retiring airline pilots at age 60, when they are disqualified from serving as pilots, because it refused to allow them to transfer to other jobs after age 60 although all younger, similarly-situated pilots were allowed to do so.

2. Whether TWA's violation of the Age Discrimination in Employment Act was willful.

3. Whether unions are liable for back pay under the Age Discrimination in Employment Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes and regulations involved	2
Statement	2
A. Background facts	3
B. The development and operation of TWA's Age 60 policy	4
C. TWA's Captain downbidding procedures compared to other methods of pilot transfer	11
D. Opinions below	13
Summary of argument	14
Argument:	
I. The undisputed facts demonstrate that TWA's Age 60 Policy constitutes a per se violation of the ADEA which cannot be justified under the exceptions to the Act	15
A. TWA's practice of involuntarily retiring captains and refusing their transfer requests at age 60 is unlawful	15
B. TWA's actions are not covered by the "bona fide seniority system" exemption in Section 4(f)(2) of the ADEA	22
C. TWA's actions are not covered by the "bona fide occupational qualification" exemption in Section 4(f)(1) of the ADEA	25
II. The court below properly awarded liquidated damages to the plaintiffs	31
A. A company that intentionally treats workers less favorably because of their age is liable for liquidated damages if it knew or should have known that its actions were governed by the ADEA	31

Argument—Continued: Page

B. The undisputed facts of this case compel the conclusion that TWA's violation was willful.. 40

III. A union that violates the ADEA is liable for monetary relief 41

A. The text and the legislative history of the Act support the award of monetary relief against ALPA 43

B. The policies of the Act support union liability 46

Conclusion 49

Appendix 1a

TABLE OF AUTHORITIES

Cases:

A. H. Phillips, Inc. v. *Walling*, 324 U.S. 490 26
Albemarle Paper Co. v. *Moody*, 422 U.S. 405 ..... 47, 48
Arritt v. *Grisell*, 597 F.2d 1267 26
Atlantic Cleaners & Dyers v. *United States*, 286 U.S. 427 33
Blackwell v. *Sun Electric Corp.*, 696 F.2d 1176..... 39
Brennan v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057 ..... 42, 47
Brennan v. *Hughes Personnel, Inc.*, 8 Empl. Prac. Dec. (CCH) ¶ 9571 47
California Brewers Association v. *Bryant*, 444 U.S. 598 24
Chevron U.S.A., Inc. v. *Natural Resources Defense Council*, No. 82-1005 (June 25, 1984) 30
Coleman v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, cert. denied, 409 U.S. 948 ..... 32, 33
Connecticut v. *Teal*, 457 U.S. 440 21
Cova v. *Coca-Cola Bottling Co.*, 574 F.2d 958..... 20
Crosland v. *Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 208 39
Donovan v. *Carl's Drug Co.*, 703 F.2d 650 ..... 32, 33
EEOC v. *ALPA*, 489 F. Supp. 1003, rev'd, 661 F.2d 90 47

Cases—Continued: Page

EEOC v. *Baltimore & O. Ry.*, 632 F.2d 1107, cert. denied, 454 U.S. 825 24
EEOC v. *Central Kansas Medical Center*, 705 F.2d 1271 32
EEOC v. *Gilbarco, Inc.*, 615 F.2d 985 31
Furnco Construction Corp. v. *Waters*, 438 U.S. 567 18
Gibson v. *Mohawk Rubber Co.*, 695 F.2d 1093..... 37
Goodman v. *Heublein, Inc.*, 645 F.2d 127..... 39-40
Hasset v. *Welch*, 303 U.S. 303 31
Hedrick v. *Hercules*, 658 F.2d 1088 39
Hertz Drivurself Stations v. *United States*, 150 F.2d 923 38
Hishon v. *King & Spalding*, No. 82-940 (May 22, 1984) 20
Hodgson v. *Sagner, Inc.*, 326 F. Supp. 371, aff'd *sub nom. Hodgson* v. *Baltimore Regional Joint Board*, 462 F.2d 180 47
Houghton v. *McDonnell Douglas Corp.*, 553 F.2d 561, cert. denied, 434 U.S. 966 ..... 18, 26
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 18
Kelly v. *American Standard, Inc.*, 640 F.2d 974.... 39
Kolb v. *Goldring*, 694 F.2d 869..... 37
Koyen v. *Consolidated Edison Co.*, 560 F. Supp. 1161 40
Laffey v. *Northwest Airlines, Inc.*, 567 F.2d 429..... 33, 36
Lauratex Textile Corp. v. *Alton Knitting Mills*, 519 F. Supp. 730 36
Loeb v. *Textron*, 600 F.2d 1003 ..... 18, 40
Lorillard v. *Pons*, 434 U.S. 575 .....32, 37, 43, 44, 47
Los Angeles Department of Water & Power v. *Manhart*, 435 U.S. 702 18
Marshall v. *Erin Food Services*, 672 F.2d 1271..... 32, 33
Marshall v. *Union Pac. Motor Freight Co.*, 650 F.2d 1085 ..... 32, 33
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792.... 13, 18, 22
Mistretta v. *Sandia Corp.*, 639 F.2d 588 39

Cases—Continued: Page

Monroe v. *United Airlines*, No. 83-1245 (7th Cir. May 30, 1984) 19
Nabob Oil Co. v. *United States*, 190 F.2d 478, cert. denied, 342 U.S. 876 38
Nashville Gas Co. v. *Satty*, 434 U.S. 136 21
Neuman v. *Northwest Airlines, Inc.*, 28 Fair Empl. Prac. Cas. (BNA) 1488 ..... 42, 46
Orzel v. *City of Wauwatosa Fire Dep't*, 697 F.2d 743, cert. denied, No. 83-205 (Nov. 28, 1983) 26, 40
Overnight Motor Transportation Co. v. *Missel*, 316 U.S. 572 37
Owen v. *City of Independence*, 445 U.S. 622 48
Parcinski v. *Outlet Co.*, 673 F.2d 34, cert. denied, No. 82-459 (Jan. 10, 1983) 20
Patterson v. *American Tobacco*, 535 F.2d 257, cert. denied, 429 U.S. 920 42
Pullman-Standard v. *Swint*, 456 U.S. 273 41
Rodriguez v. *Taylor*, 569 F.2d 1231, cert. denied, 436 U.S. 913 18
Rose v. *National Cash Register Corp.*, 703 F.2d 225 32
Sexton v. *Beatrice Foods*, 630 F.2d 478 24
Spagnuolo v. *Whirlpool Corp.*, 641 F.2d 1109 ..... 33, 39
Spies v. *United States*, 317 U.S. 492 38
Starchan Shipping Co. v. *Shea*, 406 F.2d 521, cert. denied, 395 U.S. 921 34
Stone v. *Western Air Lines, Inc.*, 544 F. Supp. 33, aff'd *sub nom. Criswell* v. *Western Airlines*, 709 F.2d 544, petition for cert. pending, No. 83-1545 ..... 19, 26
Syvock v. *Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149 ..... 39, 40
Taylor v. *Armco Steel Corp.*, 373 F. Supp. 885 42
Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 18
Thompson v. *Sawyer*, 678 F.2d 257 37
Tuohy v. *Ford Motor Co.*, 675 F.2d 842 28
United Air Lines, Inc. v. *McMann*, 434 U.S. 192 ..... 25, 28
United States v. *Bishop*, 412 U.S. 346 38
United States v. *Darby*, 312 U.S. 100 46

Cases—Continued: Page

United States v. *Fidanian*, 465 F.2d 755 38
United States Postal Service Board of Governors v. *Aikens*, No. 81-1044 (Apr. 4, 1983) 18
Usery v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 26
Wehr v. *Burroughs Corp.*, 619 F.2d 283 ..... 39, 40
Western Union Telephone Co. v. *McComb*, 165 F.2d 65, cert. denied, 333 U.S. 862 46
Whittlesey v. *Union Carbide Corp.*, 567 F. Supp. 1320 40
Williams v. *General Motors Corp.*, 656 F.2d 120, cert. denied, 445 U.S. 943 20
Winship, In re, 397 U.S. 358 34

Constitution, statutes and regulations:

U.S. Const. Amend. V 34
Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 *et seq.* 2
§ 2, 29 U.S.C. 621(b) 48
§ 4, 29 U.S.C. 623 44
§ 4(a), 29 U.S.C. 623(a) 2
§ 4(a)(1), 29 U.S.C. 623(a)(1) 16, 19, 26, 27, 29
§ 4(a)(2), 29 U.S.C. 623(a)(2) 16
§ 4(c), 29 U.S.C. 623(c) 2, 41, 45, 48
§ 4(c)(2), 29 U.S.C. 623(c)(2) 48
§ 4(c)(3), 29 U.S.C. 623(c)(3) 41, 45
§ 4(d), 29 U.S.C. 623(d) 48
§ 4(e), 29 U.S.C. 623(e) 48
§ 4(f), 29 U.S.C. 623(f) 13, 14, 27
§ 4(f)(1), 29 U.S.C. 623(f)(1) 2, 14, 24, 25, 26, 27, 28, 29
§ 4(f)(2), 25 U.S.C. 623(f)(2) 2, 14, 16, 22, 23, 24, 26, 28
§ 7, 29 U.S.C. 626 44
§ 7(b), 29 U.S.C. 626(b) 15, 21, 31, 32, 33, 34, 38, 43, 47
§ 7(c), 29 U.S.C. 626(c) 47
§ 7(c)(1), 29 U.S.C. 626(c)(1) 2, 44, 1a
§ 7(e), 29 U.S.C. 626(e) 38, 45
§ 7(e)(1), 29 U.S.C. 626(e)(1) 2, 32, 33, 38, 1a
§ 8, 29 U.S.C. 627 39
§ 12(a), 29 U.S.C. 631(a) 2

Constitution, statutes and regulations—Continued: Page

Civil Rights Act of 1964, as amended, Tit. VII, 42 U.S.C. 2000e *et seq.* ____ 19, 47
Equal Pay Act of 1963:
§ 6(d), 29 U.S.C. 206(d) ____ 47
§ 6(d)(2), 29 U.S.C. 206(d)(2) ____ 47
Fair Labor Standards Act, as amended, 29 U.S.C. 201 *et seq.*:
§ 2(a)(3), 29 U.S.C. 202(a)(3) ____ 46
§ 11(a), 29 U.S.C. 211(a) ____ 43
§ 16(a), 29 U.S.C. 216(a) ____ 38
§ 16(b), 29 U.S.C. 216(b) ____ 2, 31, 42, 43, 47, 1a
§ 16(c), 29 U.S.C. 216(c) ____ 2, 31, 44, 47, 2a
§ 17, 29 U.S.C. 217 ____ 2, 44, 47, 2a-3a
National Labor Relations Act § 10, 29 U.S.C. 160 ____ 44
Portal-to-Portal Pay Act of 1947, as amended, Tit. VI, 29 U.S.C. 216 *et seq.*:
§ 2, 29 U.S.C. 251 ____ 46
§ 6(a), 29 U.S.C. 255(a) ____ 2, 32, 33, 37, 3a
§ 10, 29 U.S.C. 259 ____ 46
§ 10(a), 29 U.S.C. 259(a) ____ 2, 45, 3a-4a
§ 11, 29 U.S.C. 260 ____ 2, 31, 32, 37, 4a
Railway Labor Act § 6, 45 U.S. 156 ____ 3
81 Stat. 604 ____ 31
Pub. L. No. 89-601, Tit. VI, § 601(b), 80 Stat. 844 ____ 32
Pub. L. No. 90-202, 81 Stat. 604 ____ 31
Pub. L. No. 93-259, 88 Stat. 55 *et seq.*:
§ 26, 88 Stat. 73 ____ 31
§ 28, 88 Stat. 74 ____ 31
Pub. L. No. 95-256, § 2(a), 92 Stat. 189 ____ 4
Federal Aviation Administration Regulations:
14 C.F.R. Pt. 121 ____ 3
Section 121.383(c) ____ 2, 4, 16

Miscellaneous:

Age Discrimination in Employment: Hearings on H.R. 3651, et al., Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess. (1967) ____ 35, 44, 45

Miscellaneous—Continued: Page

Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor and Public Welfare of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. (1967) ____ 34, 41, 45
113 Cong. Rec. (1967):
pp. 2794-2795 ____ 44
pp. 2794-2796 ____ 34
p. 2795 ____ 34, 44
p. 7076 ____ 34, 35
p. 7077 ____ 34
p. 31248 ____ 34
p. 31254 ____ 35
p. 31256 ____ 35
p. 31257 ____ 36
p. 34740 ____ 35
p. 34742 ____ 35
p. 34744 ____ 36
123 Cong. Rec. (1977):
p. 30566 ____ 29
p. 34296 ____ 29
1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* (3d ed. 1977) ____ 40
D. Dobbs, *Handbook of the Law of Remedies* (1973) ____ 37
44 Fed. Reg. 37974 (1979) ____ 30
46 Fed. Reg. 47724 (1981) ____ 30
H.R. 3651, 90th Cong., 1st Sess. (1967) ____ 34
H.R. Conf. Rep. 95-950, 95th Cong., 2d Sess. (1978) ____ 29, 37
H.R. Rep. 71, 80th Cong., 1st Sess. (1947) ____ 37
H.R. Rep. 93-913, 93d Cong., 2d Sess. (1974) ____ 31
H.R. Rep. 95-527, 95th Cong., 1st Sess. (1977) ____ 20, 28, 29
Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702 (1980) ____ 42
Report of the National Institute on Aging Panel on the Experienced Pilots Study (Dep't of Health & Human Services, Bethesda, Md. Aug. 1981) ____ 26

Miscellaneous—Continued: Page

S. 830, 90th Cong., 1st Sess. (1967) 34, 44
S. Rep. 90-723, 90th Cong., 1st Sess. (1967) 45
S. Rep. 95-493, 95th Cong., 1st Sess. (1977) 28
2A C. Sands, *Sutherland on Statutory Construction* (4th ed. 1973) 33
U.S. Department of Labor, *The Older American Worker; Age Discrimination in Employment, A Report of the Secretary of Labor to the Congress under Section 715 of the Civil Rights Act of 1964* (1965) 35

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-997
TRANS WORLD AIRLINES, INC., PETITIONER
v.
HAROLD H. THURSTON, ET AL.

No. 83-1325
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, PETITIONER
v.
HAROLD H. THURSTON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A39)[1] is reported at 713 F.2d 940. The opinion of the district court (Pet. App. A44-A61) is reported at 547 F. Supp. 1221.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1983, and rehearing was denied on November 10, 1983 (Pet. App. A41-A42). The petition for a writ of certiorari in No. 83-997 was filed on December 16, 1983, and granted on February 27, 1984; the cross-petition (No.

---

[1] "Pet. App." references are to the Appendix to the Petition in No. 83-997.

83-1325) was filed on February 8, 1984, and granted on April 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sections 4(a), (c), (f)(1), (2) and 12(a) of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. 623(a), (c), (f)(1), (2) and 631 (a); and Section 121.383(c) of the Federal Aviation Administration Regulations (14 C.F.R.), are set forth at 83-997 Pet. 2-5. Section 7(c)(1) and (e)(1) of the ADEA (29 U.S.C. 626(c)(1) and (e)(1)); Sections 16(b), (c) and 17 of the Fair Labor Standards Act, as amended (29 U.S.C. 216(b), (c) and 217); and Sections 6(a), 10(a) and 11 of the Portal-to-Portal Pay Act of 1947 (29 U.S.C. 255(a), 259(a) and 260) are set forth in a statutory appendix to this brief (App., *infra*, 1a-4a).

STATEMENT

This case began on November 14, 1978, when Harold Thurston and Christopher Clark brought suit against Trans World Airlines, Inc. (TWA) and the Air Line Pilots Association (ALPA), the pilots' bargaining representative, challenging their involuntary retirement at age 60 as a violation of the ADEA.[2] The Equal Employment Opportunity Commission (EEOC) intervened as plaintiff on behalf of other involuntarily retired TWA captains and other crew members adversely affected by TWA's practice of imposing more restrictive transfer rules on those seeking transfers because of their age than on those seeking transfers for other reasons. The district court granted summary judgment to TWA and ALPA (Pet. App. A57-A61). The court of appeals reversed, finding that the district court had ignored direct evidence of discrimination, and entered judgment for plaintiffs (Pet. App. A24).[3]

[2] Thurston, Clark and a third plaintiff, Clifton Parkhill, were captains for TWA who sought to continue working by transferring to flight engineer positions. Such a transfer was necessary to their continued employment on the flight deck because of an FAA regulation requiring captains, but not flight engineers, to be under 60 years of age (14 C.F.R. 121.383(c)).

A. Background Facts[4]

TWA, a commercial airline certified by the Civil Aeronautics Board and operating under Part 121 of the Federal Aviation Regulations (14 C.F.R. Pt. 121), employs approximately 3000 pilots in four cockpit positions (C.A. App. 930, 991-992).[5] The captain commands the aircraft and is responsible for all phases of its operation (C.A. App. 250, 339). The first officer assists or relieves the captain as co-pilot (*ibid.*). The flight engineer (called second officer on some airlines) is primarily responsible for monitoring the mechanical, electrical, and electronic functioning of the aircraft (C.A. App. 250, 340). On certain long-distance flights there is a fourth crew member, an International Relief Officer (IRO), who acts as third in command and who performs both flight engineer and first officer duties, except aircraft takeoff and landing (C.A. App. 330, 339-340, 350-352).

[3] In a separate action, ALPA brought suit against TWA, charging that the company's practice of allowing anyone to serve in the cockpit beyond the age of 60 was a unilateral change in the pilots' rates of pay, rules, or working conditions in violation of Section 6 of the Railway Labor Act (RLA), 45 U.S.C. 156. ALPA also sought a declaratory judgment that the ADEA amendments did not require any changes in TWA's practice of mandatorily retiring all pilots at age 60 (C.A. App. 108-113). The district court dismissed ALPA's suit on summary judgment (Pet. App. A50-A54) and the court of appeals affirmed (Pet. App. A13-A21). ALPA has not sought review of that dismissal in this Court.

[4] The parties agreed in the court below that the case was appropriate for disposition on summary judgment as to liability (Pet. App. A5). The facts summarized derive principally from the affidavits or deposition testimony of TWA officials and from TWA's answers to interrogatories.

[5] The TWA-ALPA collective bargaining agreement refers to all cockpit, or flight deck, positions as "pilot". We follow that usage herein, except where the context indicates otherwise.

A regulation promulgated by the Federal Aviation Administration (FAA) prohibits anyone from serving as a pilot on a commercial carrier beyond age 60 (FAA Age 60 Rule).[4] Captains, first officers and IROs are considered "pilots" subject to this FAA regulation; flight engineers are not (C.A. App. 543-548, 1006, 1026).

The retirement plan for all pilots negotiated between TWA and ALPA, in effect at the time this dispute arose,[5] provided that the "normal retirement date is the [pilot's] 60th birthday" and that "[pilots] must retire by their normal retirement date unless written approval by the company is granted for continuance in employment" (C.A. App. 401, 418). Those provisions have been in the plan for many years, and until 1978 TWA employed no one over age 60 as a pilot on its airplanes. The same retirement provision appears in the 1982 plan negotiated between TWA and ALPA. Pet. App. A8.

B. The Development and Operation of TWA's Age 60 Policy

Effective April 6, 1978, the ADEA was amended to prohibit the involuntary retirement of covered employees. Section 2(a), Pub. L. No. 95-256, 92 Stat. 189. For several months thereafter, TWA continued to retire all pilots at age 60. However, on July 19, 1978, the company announced a new policy in a letter from David Crombie, TWA Senior Vice President for Administration, to ALPA that stated that TWA was legally obligated to employ all pilots as flight engineers beyond age 60 and to offer to

[4] The regulation states:

"No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday." See 14 C.F.R. 121.383(c).

[5] The retirement plan, like the collective bargaining agreement between ALPA and TWA ("Working Agreement"), became effective October 1, 1977 (C.A. App. 401, 403-404).

reinstate as flight engineers all pilots mandatorily retired after April 6, 1978 (C.A. App. 426-428).[6] The text of the letter made clear that TWA contemplated no "bidding" requirement for captains who wished to be recalled to or to continue employment as flight engineers beyond the age of 60.[7]

The Crombie letter also indicated that no change would be made until ALPA presented its views (C.A. App. 428).

[6] Crombie's position was based on his view of the requirements of the ADEA, and the risk of "the double damage penalty for a willful violation" (Hilly Deposition, July 7, 1980, at 72). He had received legal advice on this matter (id. at 104).

[7] The letter from Crombie to the Chairman of the TWA Master Executive Council (TWA-MEC) of ALPA stated in pertinent part (C.A. App. 426-427):

> [T]he Company believes the 1978 Amendments, the pertinent FARs [Federal Aviation Regulations], the Working Agreement and the Railway Labor Act require that the following steps be taken by it and the Association:
>
> 1. Advice be given to all pilots and flight engineers that they will not be compelled to retire solely because they have reached age 60, the mandatory retirement age under their pension plans.
>
> 2. Advice be given to all pilots and flight engineers who have retired upon reaching age 60 after April 6, 1978, that they are eligible for reemployment by the Company as flight engineers without loss of seniority provided they advise the Company of their intention to seek reemployment promptly and thereafter report for work without undue delay.

Consistent with Crombie's letter, the Chairman of the TWA-MEC had previously informed Council members on June 21, 1978 (C.A. App. 1027-1040):

> TWA is tentatively planning imminent announcement of plans to retain pilots and flight engineers in active employment after age 60, with duty as flight engineer. Also, pilots and flight engineers who have retired since April 6, 1978 will be offered opportunity to return as flight engineer. Captains and first officers desiring training as flight engineer will be so qualified. All of the above is in accordance with the "Age Discrimination In Employment Act" which became effective April 6, 1978, and with our Working Agreement.

These views, communicated to TWA during the summer of 1978, showed ALPA to be completely opposed to the employment of any pilot beyond age 60, even as flight engineer (C.A. App. 1027, 1033-1037, 1041-1049, 1050-1054).

When Crumbie was hospitalized shortly after the letter was dispatched, responsibility for development of policy on the age 60 question was transferred to J. Edward Frankum, TWA's Vice President of Flight Operations. Unlike Crumbie, Frankum opposed the employment of pilots beyond age 60 and did not agree with the position stated in Crumbie's July 19th letter (C.A. App. 828-836, 1000-1005, 1022, 1027-1029). Frankum stated that after Crumbie was hospitalized, "I, in effect disavowed [that] letter and we proceeded from there" (C.A. App. 1005A).[10]

On August 10, 1978, Frankum caused TWA to issue a brief bulletin to its personnel stating that "any cockpit crewmember who is in flight engineer status at age 60 may not be compelled to retire" (C.A. App. 425, 1006-1007). The bulletin did not indicate whether captains or first officers would be permitted to downgrade to flight engineer status, or if so, by what procedure.

After August 10, TWA offered reinstatement to the flight engineers and IROs who had been involuntarily retired between April 6 and August 10, 1978 (C.A. App. 846, 849 (Resp. 3c), 625, 630 (Resp. 13)). Five retirees

[10] Frankum's deposition testimony confirmed that he had forcefully expressed his views to Crumbie (Frankum Deposition July 9, 1980, at 156-158):

> Q. Did you have any [conversations with Crumbie] on the subject of the age sixty legislation?
> A. Of course.
> Q. Can you tell us what you said in any of those discussions?
> A. Yes. I told him that I didn't want to fly anybody past age sixty.
> Q. Did you discuss it any further than that?
> A. I told him that him and his lawyers were full of it.
> Q. What else was said?
> A. That sums it up.

accepted the offer and were reinstated (C.A. App. 463, 930, 997-998).[11] None of the three original plaintiffs or EEOC claimants who were forced to retire as captains during this period was offered reinstatement.[12] Flight engineers and IROs reaching their 60th birthdays after August 10, 1978, have been allowed to continue employment as flight engineers (C.A. App. 930, 937, 971). A TWA captain or first officer is mandatorily retired on his 60th birthday, however, unless he has bid on and been awarded a flight engineer vacancy with an effective date before his 60th birthday (C.A. App. 184, 186-187 (¶ 11)).[13] TWA refuses to honor a bid for a vacancy effective after a captain's 60th birthday on the ground that "[bids] can only be awarded to somebody on the seniority list and at age 60 a man goes off the seniority list" (C.A. App. 930, 974). The only pilots who go "off the seniority list", however, are captains and first officers at age 60 because, according to TWA, they are required to be retired on that date under the FAA Age 60 Rule (C.A. App. 184, 187 (¶ 13), 930, 974-980, 990, 852, 856-860 (Resp. 12)). The TWA-ALPA Working Agreement does not require extinguishing the

[11] International Relief Officers were offered reinstatement despite the fact that they are subject to the FAA Age 60 Rule, just as captains and first officers are (C.A. App. 1026).

[12] There were initially thirteen former TWA captains—three original plaintiffs and ten EEOC claimants—challenging their involuntary retirement. Three of the EEOC claimants have settled with TWA (see note 20, *infra*). Of the remaining ten captains, three became 60 before August 10, 1978. Private plaintiff H. Thurston was retired on June 11, 1978, after his request to continue employment beyond age 60 was denied by the company on May 26, 1978 (C.A. App. 903-905, 909-910, 647). EEOC claimant A.M. Lusk was retired on May 2, 1978, and TWA denied his October 1978 request to be recalled as a flight engineer (C.A. App. 576, 581-582, 592, 645-646). EEOC claimant L.D. Bobzin was retired on May 9, 1978, after his request to continue employment was denied (C.A. App. 643-644).

[13] The effective date of a vacancy is the date on which a pilot is expected to assume the new position (C.A. App. 930-932).

seniority of captains and first officers who are barred from continuing in these positions by virtue of the FAA Age 60 Rule. Rather, Section 17 of the Agreement, entitled "Seniority", simply provides that "[a]ny pilot whose services with the Company are permanently severed shall forfeit his seniority rights" (C.A. App. 250, 294 (Section 17(A)(6)).[14]

As a direct result of TWA's "effective date" bidding restriction, six of the seven captains in this litigation who turned 60 after August 10 were involuntarily retired. Two were retired after filing bids because their 60th birthdays arrived before September 1, 1978, the effective date of the first flight engineer vacancies to be announced after August 10 (C.A. App. 184, 187 (¶¶ 12-14), 468-470).[15] The four others, who reached age 60 after September 1, 1978, were nonetheless retired because no vacancies were posted subsequent to their bids which carried effective dates preceding their sixtieth birthdays.[16]

---

[14] While age 60 captains unable to secure flight engineer vacancies are severed from employment, TWA, at its discretion, currently allows younger pilots extended, unpaid "personal time off." These leaves can be requested for any reason, are granted in one-month increments, and are rarely denied. In any given month, 7 to 12 pilots are on personal leave (C.A. App. 930, 962-965).

[15] TWA refused to honor the bid filed by private plaintiff C. A. Parkhill on August 15 because the September 1st vacancies fell nine days beyond the date of his 60th birthday, August 22, 1978 (C.A. App. 911, 913, 916-918). EEOC claimant R. Gowling was retired on August 27, 1978, his 60th birthday, because the September 1st vacancies fell four days thereafter (C.A. App. 576, 581-582, 592).

[16] EEOC claimant T.M. Widmayer placed a bid on November 1, 1978, and was retired on his sixtieth birthday, November 10, 1978 (C.A. App. 576, 581-582, 592). EEOC claimant A.T. Humbles filed a bid on June 5, 1979, but there was only one vacancy between that date and September 14, 1979, when Humbles turned 60, and that was awarded to a "career flight engineer" with priority bidding rights to flight engineer vacancies (C.A. App. 576, 581-582, 592, 496-499). EEOC claimant D.V. Roquemore was retired when he

After the August 10 bulletin establishing the "effective date" requirement, TWA imposed two additional restrictions on downbidding captains. Both restrictions were advocated by ALPA and adopted in 1980 (C.A. App. 1041, 1063-1069, 1074-1077).[17] The first of these requires successful captain downbidders to "fulfill their bids in a timely manner" (*ibid.*). At first, captains who bid successfully for flight engineer vacancies were allowed to fly as captains until they became 60, and were then scheduled for flight engineer training.[18] Under the

---

turned 60 on August 21, 1981, because the next available vacancy after his bid carried an effective date ten days beyond his birthday.

Private plaintiff C.J. Clark was retired when he turned 60 on September 19, 1978. Clark wrote to TWA in July 1978 requesting continued employment beyond age 60 (C.A. App. 929). In a letter dated August 3, 1978, TWA responded that, for the time being, Clark would not be permitted to work as a flight engineer beyond age 60. The letter went on to state that "should our policies ultimately be such that they would have permitted you to continue to work after attaining age 60, you will be reinstated effective on your sixtieth birthday, with the pay and benefits then applicable to flight engineers who continue to work after age sixty" (C.A. App. 648). In light of this letter, Clark believed that he need not file a bid for a flight engineer vacancy in order to continue working in that position after his sixtieth birthday (C.A. App. 919, 922-924). If he had bid on the vacancies that became effective on September 1, 1978, Clark would have been awarded one based on his seniority relative to that of other bidders (C.A. App. 919, 925-928).

[17] ALPA also suggested other restrictions that would have adversely affected older pilots. For example, the union proposed that TWA furlough over-age-60 flight engineers before other engineers, regardless of company seniority, or that over-age-60 flight engineers be assigned a new seniority date corresponding to the date upon which they qualify as flight engineers (C.A. App. 1041, 1046-1066).

[18] For example, Ruble, who turned 60 on January 28, 1979, was not scheduled for training until March 26, 1979 (C.A. App. 675, Line 1). Lundberg, who turned 60 on February 9, 1979, also was not scheduled for training until March 26, 1979 (C.A. App. 675, Line 2). These and other downbidders who turned 60 in 1979 were placed on vacation status at captains' pay between their 60th birthday and the date upon which their training began (C.A. App. 930, 986-988).

amended practice, captains who have secured flight engineer bids are required to activate them immediately, even before their 60th birthdays (C.A. App. 1041, 1070-1071). The result is that most downbidding captains are trained for and assume flight engineer positions before age 60, with a concomitant loss in pay and responsibility, whereas before implementation of this rule virtually all downbidders were permitted to complete their full careers as captains. (Compare training dates and birth dates of downbidding captains in 1979 and in 1980-1981 at C.A. App. 568, 570 (Resp. 6), 574).)[18]

The second restriction further limited bidding rights. Under prior practice a successful downbidder was placed in off-duty-without-pay status after his 60th birthday if he had not then passed the written examination prepared by the FAA as a prerequisite for pilot entry into flight engineer training (C.A. App. 473-476). In January 1980, however, TWA began cancelling the bid of any captain who has not passed the flight engineer examination when reporting for training (C.A. App. 477-480). This practice, operating in conjunction with the "effective date" requirement, precipitated the retirement of three of the EEOC's original ten claimants.[19]

---

[18] While TWA now immediately schedules successful downbidders for training, it has deferred training for younger pilots where the scheduled training dates cause personal hardship (C.A. App. 930, 935-936, 980-982).

[19] T. Emrich and J.L. Clark were retired after their bids were cancelled and their subsequent rebids failed for lack of vacancies carrying an effective date prior to their sixtieth birthdays (C.A. App. 872-873, 846-847, 850-851). Both have since settled with TWA, as has EEOC climant R.F. Adickes who was retired after sickness prevented him from reporting for training and his bid was cancelled.

EEOC claimant H.W. Lewis was awarded a bid effective October 31, 1979. He was originally informed that if he failed to pass the written examination before his training date, he would be placed on leave without pay until he passed it. On January 15, 1980, he received a scheduled training date and a warning that failure to pass the examination would result in cancellation of his bid. Mr. Lewis declined to take the examination or appear for training because he wished to continue to fly as captain until his 60th birthday, on November 4, 1980. His bid was therefore cancelled and his rebid, filed September 24, 1980, failed for lack of appropriate vacancies (C.A. App. 501-510, 846-847, 850-851).

C. TWA's Captain Downbidding Procedures Compared to Other Methods of Pilot Transfer

The bidding system procedure that TWA applied to the captains approaching age 60 [20] is not the only method provided in the Working Agreement with ALPA to permit pilots to move from one position to another. For pilots who are compelled to vacate their positions because of non-age related reasons, the Working Agreement specifies transfer procedures that do not involve bidding and do not result in discharge if no transfer is available. The Working Agreement thus provides that a captain or first officer who is unable to maintain a first-class medical certificate, which is required for those positions by the FAA, may automatically "displace" or "bump" a less senior flight engineer, and thereby assume his position, if the medically disabled pilot can acquire the second-class medical certificates required for that position. C.A. App. 250, 302-303 (Section 19(A)(3), (A)(4)(a)). In that situation, assignment to flight engineer status is not conditioned upon the existence of a flight engineer vacancy (C.A. App. 623, 626-627 (Resp. 6)). Moreover, if the disabled pilot lacks sufficient seniority to displace, he is not discharged. Rather, he is entitled to go on unpaid

---

[20] Under this system, a pilot who wishes to transfer from one "status" (position) to another, or from one "domicile" (base location) to another, files a bid for the desired vacancy. Vacancies are generally announced as they arise. Bids can be filed in advance of specific vacancy announcements ("Standing Bid") or in response to those announcements ("Telegram Bid"). C.A. App. 184, 185 (¶¶ 9-10), 250, 302-304 (Section 19(A)(5), (A)(6), (B), (C)). Vacancies are awarded to qualified bidders in order of seniority, *i.e.*, date of hire with the company. C.A. App. 184, 186 (¶ 8), 250, 294 (Section 17(A)(1), (A)(3)).

medical leave for up to five years, during which time he retains and continues to accrue seniority, and has a priority right to bid on and retain a flight engineer position in preference to any more senior pilot who is medically qualified for the captain or first officer seat. C.A. App. 250, 298-299 (Sections 18(B)), 302, 303 (Section 19(A)(4)(b)).

Similarly, the Working Agreement provides that a pilot whose position is eliminated at a domicile due to reduced manpower needs may use his seniority to displace the least senior pilot in any position at his current or last former domicile, or in his current position anywhere in TWA's system. C.A. App. 250, 311-312 (Section 19(G)). Like his medically disabled counterpart, the jobless pilot who lacks sufficient seniority to displace is not discharged. Rather, he is placed in furlough status, which may extend for a period of up to ten years, during which time he continues to accrue seniority for purposes of a recall (C.A. App. 861-869). Seniority governs reemployment after release due to such a reduction in force. C.A. App. 250, 294 (Section 17(A)(3)).[22]

In addition, the Working Agreement provides that a pilot who fails training to upgrade to captain or first officer is not discharged, but is instead assigned to permanent flight engineer status at his permanent domicile, whether or not a flight engineer vacancy there exists (C.A. App. 250, 265-266 (Section 6(B)(16)), 930, 941-948). Similarly, as a disciplinary measure in response to demonstrated incompetence, TWA has frequently (C.A. App. 1006, 1024-1026) downgraded a pilot to a lower position for which he is qualified, without requiring the pilot to bid for a vacancy. C.A. App. 930, 972-973, 250, 266 (Section 6(B)(17)).

---

[22] As of 1982, TWA was operating under a "furlough aversion" agreement with ALPA: it reduced the hours worked by all of the pilots in its system rather than furloughing pilots rendered surplus due to operational cutbacks (C.A. App. 930, 938-940).

D. Opinions Below

On motions for summary judgment, the district court ruled that TWA and ALPA were entitled to judgment against the Thurston plaintiffs and the EEOC as a matter of law. The court held, first, that plaintiffs could not establish a prima facie case of age discrimination, under the test set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), because none could show that a flight engineer vacancy existed "at the time [he] applied and [was] eligible for the job" (Pet. App. A57). The district court further held that the involuntary retirements and the downbidding requirements themselves fell within the exceptions provided by Section 4(f) of the ADEA, for the following reasons. Finding that the bidding procedures "follow a seniority system which was instituted for nondiscriminatory reasons and is applied in a neutral manner," the court concluded that "any denial of Flight Engineer status to pilots resulted from the neutral application of this bona fide seniority system and not by discriminatory treatment on the basis of age" (Pet. App. A60). The retirement of unsuccessful bidders, the court further stated, was "due solely to their reaching [age 60] while in the pilot status," an age which the court characterized as "a bona fide occupational qualification for airline pilots by virtue of the FAA regulations" (*ibid.*).

The court of appeals reversed. Noting that the *McDonnell Douglas* formula is not an "inflexible rule" (Pet. App. A23), the court below rejected the district court's mechanical application of the formula. Since direct proof of discriminatory treatment is just as probative as the circumstantial proof outlined in *McDonnell Douglas*, the court ruled that a prima facie case had been established by the evidence "that TWA grants the downgrading requests of all pilots with sufficient seniority except those of captains and first officers who reach age 60" (Pet. App. A24).

The court of appeals also rejected TWA's and ALPA's statutory defenses under Section 4(f)(1) and (2): petitioners' actions were not immune under Section 4(f)(2) because the involuntary retirement of captains at age 60 "is in no way mandated by the negotiated seniority system" (Pet. App. A26); and the retirements were not permissible under Section 4(f)(1), because it was undisputed that age 60 was not a BFOQ for flight engineers (Pet. App. A28).

Because ALPA "actively campaigned" in favor of retiring all pilots at age 60 and opposed any attempts by TWA at partial compliance with the ADEA, the court held the union to be jointly liable (Pet. App. A32-A33). However, it refused to order ALPA to pay any monetary relief (Pet. App. A38-A39). The court did order TWA to pay liquidated damages, since the record clearly showed that the company's discriminatory acts satisfied the standard adopted by the court for willful violations—the acts were knowing, intentional, and voluntary, and taken in reckless disregard of the ADEA's proscriptions (Pet. App. A33-A34).

SUMMARY OF ARGUMENT

TWA uniformly permits pilots who are disqualified from their current positions for non-age reasons to remain employed, to continue to accrue seniority and to transfer to a position for which they are qualified as soon as it is available. The company, with ALPA's encouragement and support, nevertheless denies these privileges to pilots who are disqualified because of age. This disparity in treatment is based solely on age and is thus in direct violation of the ADEA.

Section 4(f) of the ADEA permits an employer to take adverse personnel actions to observe the terms of a bona fide seniority system or where age is a bona fide occupational qualification reasonably necessary to the performance of the job involved. Neither exception excuses TWA's decision to establish especially stringent transfer policies for pilots approaching age 60. The injury challenged here is the forced retirement of captains and first officers at age 60, and their resulting exclusion from the seniority system. Nothing in either the FAA Age 60 Rule or the TWA-ALPA Working Agreement requires such forced retirement, or suggests that age 60 is a BFOQ for the flight engineer position. In any event, the seniority system exemption does not apply to involuntary retirements.

With respect to relief, the court below correctly determined the TWA willfully violated the Act and awarded liquidated damages pursuant to Section 7(b) of the ADEA. When an employer intentionally discriminates among its employees on the basis of their age, and knows or should know of the applicability of the ADEA, any violation of the Act is willful. This interpretation is consistent with the uniform interpretation of the language in the Portal-to-Portal Act from which the ADEA provision is derived, and best serves its compensatory purpose. Neither that purpose nor the cases support a requirement of specific intent.

Finally, we submit that the court below erred in exempting ALPA from any monetary liability for its clear statutory violation. The text, legislative history, and policies of the ADEA fully support the conclusion that unions which violate the Act's prohibitions are monetarily liable to the victims of their discrimination.

ARGUMENT

I. THE UNDISPUTED FACTS DEMONSTRATE THAT TWA'S AGE 60 POLICY CONSTITUTES A PER SE VIOLATION OF THE ADEA WHICH CANNOT BE JUSTIFIED UNDER THE EXCEPTIONS TO THE ACT

A. TWA's Practice of Involuntarily Retiring Captains and Refusing Their Transfer Requests At Age 60 is Unlawful

The ADEA prohibits an employer from discriminating against any employee between the ages of 40 and 70 "with respect to his compensation, terms, conditions, or

privileges of employment, because of such individual's age," and from limiting, segregating, or classifying its employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. 623(a)(1) and (2). The 1978 Amendments to the Act expressly forbid the involuntary retirement of any employee within the protected age group "because of the age of such individual" (29 U.S.C. 623(f)(2)). The court of appeals correctly held on undisputed evidence that TWA is in direct violation of these statutory prohibitions.

1. The policy that adversely affects TWA's captains here is age-based on its face. The company forces a captain to retire on his 60th birthday if he has not secured a flight engineer bid with an effective date prior to that date. TWA refuses to honor a bid for a vacancy carrying an effective date beyond a captain's 60th birthday because he is deemed to be retired at 60, and therefore stripped of the seniority that would entitle him to be awarded such a bid.

These facially age-based practices are not justified by the fact that a captain or co-pilot at age 60 is precluded from actively serving in those capacities by virtue of the FAA Age 60 Rule (14 C.F.R. 121.383(c)).[30] It is undisputed that TWA uniformly permits pilots who are disqualified from retaining their current positions for non-age related reasons to remain employed and to continue to accrue and exercise seniority. Such pilots thus may move, immediately or eventually, into positions for which they remain qualified. If any one of TWA's 3000 pilots is rendered ineligible to retain his captain or co-pilot seat because of a medical disability (and consequent failure to meet FAA requirements), or if he loses his position because of reduced flying requirements, he is entitled to exercise his seniority rights to displace a less senior flight

[30] The validity of the FAA Rule is not at issue in this case. See notes 29, 32 & 34, *infra*.

engineer or to be placed on unpaid leave until he accrues sufficient seniority to bid on and secure a position for which he is qualified. Similarly, if any one of TWA's pilots fails training to upgrade to captain or co-pilot, or displays such incompetence as to warrant discipline, that pilot is permanently and automatically downgraded to a position for which he remains qualified. TWA proffered no reason for denying the same treatment to the handful of older pilots,[31] similarly disqualified by virtue of the FAA regulation, who each year since 1978 have sought to continue working as flight engineers.[32]

2. The court of appeals correctly held that this "direct evidence of a differentiation based solely on age" (Pet.

[31] Seventy of the three or four hundred captains and first officers who reached age 60 between 1978 and 1981 have sought to continue working beyond that age (C.A. App. 189-190).

[32] TWA now suggests (Br. 12-13) that the difference in treatment is attributable to the fact that, while approximately 20 captains each year seek to continue employment as flight engineers after they reach 60, fewer pilots have invoked their contractual rights to move into alternative assignments upon loss of their present positions for non-age reasons. TWA conspicuously omits from this discussion any reference to its liberal transfer policy for pilots who lose their jobs because of operational cutbacks (page 12, *supra*). In any event, because the non-age transfer policies are included in the Working Agreement, TWA has committed itself to permit all younger jobless pilots to remain employed in alternative positions, regardless of the number of pilots involved.

TWA also cites (Br. 17 n.19) the arbitration decision denying respondent Thurston's contractual grievance claim (ALPA Br. in Op. App. B16-B19; C.A. App. 526-527) as evidence that its treatment of the younger pilots does not require it to treat the overage pilots similarly. But the arbitrator simply held that the contractual transfer provisions in the Working Agreement were not directly applicable to Thurston's age-based claim (ALPA Br. in Opp. B16-B18; C.A. App. 530-531). The arbitration decision "emphasized * * * that in deciding this case, the System Board renders no opinion with respect to any *legal* rights that Captain Thurston might have under the ADEA" (emphasis in original) (ALPA Br. in Opp. B13-B14; C.A. App. 530). Here, of course, those are the only rights in issue—there is no claim that any of the pilots here involved have transfer rights under the express contractual provisions of the Working Agreement.

App. 24) established an unrebutted prima facie case. As in *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), the employer's claim that its practices were not motivated by a discriminatory intent, and thus that it cannot be liable under a discriminatory treatment theory, overlooks the fact that the challenged employment practice was discriminatory on its face. Here, as in *Manhart*, "[s]uch a practice does not pass the simple test of whether 'treatment of a person [is] in a manner which but for that person's [age] would be different'" (435 U.S. at 711). See also *Houghton* v. *McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), cert. denied, 434 U.S. 966 (1977); *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1237 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978).

Contrary to TWA's contention (Br. 22-25), *McDonnell Douglas Corp.* v. *Green*, *supra*, does not require respondent pilots and EEOC to establish a prima facie case by proof that there was a flight engineer vacancy at the time each captain applied. In *McDonnell Douglas*, a refusal to hire case, this Court set forth one mode of making a prima facie showing that the action complained of was based on a discriminatory criterion. See *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 253-254 (1981); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977). As the court below recognized (Pet. App. A24), however, the *McDonnell Douglas* method of proof is not "an inflexible rule" (*Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 575 (1978); *United States Postal Service Board of Governors* v. *Aikens*, No. 81-1044 (Apr. 4, 1983)); that method of proof was simply designed to assure "the plaintiff his day in court despite the unavailability of direct evidence." *Loeb* v. *Textron*, 600 F.2d 1003, 1014 (1st Cir. 1979); see *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 358 n.44. The court below correctly held that the *McDonnell Douglas* formula is inapposite where, as here, respondents' prima facie case of discriminatory treatment rests on "direct evidence of a differentiation based solely on age" (Pet. App. A24), *i.e.*, that TWA involuntarily retires and refuses transfers to pilots precisely because they have reached age 60, at the same time that it permits all similarly-situated younger pilots to continue their employment in positions for which they remain qualified. Accord, *Stone* v. *Western Air Lines, Inc.*, 544 F. Supp. 33, 36-37 (C.D. Cal. 1982), aff'd sub nom. *Criswell* v. *Western Airlines*, 709 F.2d 544 (9th Cir. 1983), petition for cert. pending, No. 83-1545; *Monroe* v. *United Airlines*, No. 83-1245 (7th Cir. May 30, 1984), slip op. 14-15.[20]

3. TWA's argument (Br. 16-20) that the holding below establishes an "extreme standard of liability", mandating "special treatment" or an age-based right to "accommodation" for older pilots, in contravention of the ADEA's legislative history and case law, is equally without merit.

Section 4(a)(1) of the ADEA (29 U.S.C. 623(a)(1)) prohibits age discrimination with respect to the "terms, conditions, or privileges of employment." One "privilege" of a pilot's employment at TWA is the right to remain employed even though disqualified from retaining his current position, and to use his seniority to move into an alternative assignment for which he is qualified. Under the ADEA—like Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq.*)—a "benefit

---

[20] Petitioner TWA's claim that there were no flight engineer vacancies the plaintiffs could fill simply begs the question. It is age, and not the lack of vacancies, that explains the difference in treatment between plaintiffs and TWA's younger pilots. When the latter need to change their status because they are unable to retain their present positions, they either displace junior pilots, thus creating their own "vacancies", or they wait on leave or furlough status until they can displace a junior pilot. If the same rules had been applied to plaintiffs as to their younger brethren, vacancies would have existed because seniority would determine their right to displace other pilots and they were the most senior pilots employed by TWA.

that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." *Hishon* v. *King & Spalding*, No. 82-940 (May 22, 1984), slip op. 5. TWA's policy towards overage pilots violated this basic requirement because, as the court below explained (Pet. App. A31 (*footnote omitted*)):

> TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers * * *. The sole reason for its discrimination against age-60 captains and first officers is their age; this is prohibited by the ADEA.

That holding, which does no more than reiterate a basic principle of the ADEA, is entirely consistent with legislative intent and prevailing case law. Contrary to TWA's claim (Br. 18-19), the court clearly understood that the ADEA "does not require employers to provide special working conditions for older workers to allow them to remain or be employed" (H.R. Rep. 95-527, 95th Cong., 1st Sess. 12 (1977)), but simply mandates "that an employee's age be treated in a neutral fashion, neither facilitating nor hindering advancement, demotion, or discharge." *Parvinski* v. *Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), cert. denied, No. 82-459 (Jan. 10, 1983). Accord, *Williams* v. *General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), cert. denied, 445 U.S. 943 (1982); *Coon* v. *Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (8th Cir. 1978). Indeed, in rejecting TWA's argument that a ruling in favor of respondent pilots and EEOC required preferential treatment,[21] the court explained (Pet. App. A29-A30):

> [Respondents] merely seek the same treatment accorded all younger captains and first officers who become unable to serve in their former capacities for non-age reasons. There is nothing "special" or "preferential" about equal treatment.

[21] TWA also incorrectly suggests (Br. 39) that EEOC seeks preferential treatment for age 60 captains or first officers. What EEOC will seek on remand is "such * * * equitable relief as may be appropriate to effectuate the purposes of [the] Act" (29 U.S.C. 626(b)) which, at a minimum, must permit captains and first officers to retain their positions until age 60 and then treat them like all similarly situated employees no longer able to perform their jobs for reasons other than age—*i.e.*, permit them to transfer to flight engineer positions if they have sufficient seniority to do so, or, if not, to remain on vacation and then leave without pay while accruing sufficient seniority to entitle them to a position (C.A. App. 841-842).

Equally spurious is TWA's claim that because "plaintiffs * * * get the same accommodations for non-age reasons as everyone else," the company has satisfied the ADEA by treating everyone equally (Br. 17). The fact that older pilots may be treated equally in other respects does not excuse the fact that age-60 pilots are the only pilots severed from the work force when they can no longer retain their present positions, nor does it shield TWA from liability for the age-based disparity in treatment between similarly situated pilots. Cf. *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977) (a company cannot refuse to grant leaves of absence for pregnancy and avoid liability for sex discrimination by asserting that it grants leaves for other disabilities equally to both men and women).

Finally, there is no merit to TWA's claim (Br. 21-22) that it cannot be guilty of age-based discrimination because many older officers were successful in complying with the company's restrictive downbidding procedure. As the court below recognized, "[t]he ADEA, like Title VII, 'does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her [protected class] * * * were hired. * * * Every *individual* employee is protected against * * * discriminatory treatment'" (Pet. App. A28, quoting *Connecticut* v. *Teal*, 457 U.S. 440, 455 (1982) (emphasis in original)). In any event, as the court further noted (*ibid.*), TWA's policy exacts a toll even from successful downbidders. These pilots are forced to bid for a vacancy substantially in advance of their 60th birthdays in order to avoid the risk that no vacancy will later be available, and to enter training and fill that vacancy as close as possible to its effective date. The result is that a captain perfectly capable and qualified to retain the position in which he has served the company for years is forced prematurely into the less prestigious and lower paying flight engineer job.

B. TWA's Actions Are Not Covered by the "Bona Fide Seniority System" Exemption in Section 4(f)(2) of the ADEA

The district court held that TWA's actions were lawful under Section 4(f)(2) of the ADEA (29 U.S.C. 623(f)(2)) as taken "to observe the terms of a bona fide seniority system." (Pet. App. A59-A60.) According to the district court, TWA's bidding procedures "follow a seniority system which was instituted for nondiscriminatory reasons and is applied in a neutral manner. • • • [A]ny denial of Flight Engineer status to pilots resulted from the neutral application of this bona fide seniority system and not by discriminatory treatment on the basis of age" (Pet. App. A60). The court of appeals disagreed, and correctly rejected TWA's seniority system defense under Section 4(f)(2) (Pet. App. A25-A26). TWA attempts to revive that defense in its brief on the merits in this Court (Br. 26-30) in the guise of a legitimate, nondiscriminatory reason for its actions under *McDonnell Douglas Corp.* v. *Green*, *supra*.[28] But however the argument is presented, TWA's seniority system cannot excuse the discrimination challenged here for two independent reasons: First, the statute, as amended in 1978, expressly excludes involuntary retirement from the types of personnel actions that can be immunized under Section 4(f)(2), and second, the action that injured respondent pilots was not based on TWA's seniority system.

Effective April 6, 1978, Section 4(f)(2) was amended to provide that no bona fide seniority system or benefit plan relied upon to excuse an employer's age-based personnel actions "shall require or permit the involuntary retirement of any [40 to 70 year-old] individual because of • • • age" (29 U.S.C. 623(f)(2)). The involuntary retirements challenged here all occurred after April 1978 (TWA Br. 13, n.16). Thus, even if, as TWA claims,

[28] We note that the question whether TWA's seniority system is a viable defense to liability was not presented in the company's petition for certiorari.

they resulted from its compliance with its bona fide seniority system, they would not be protected by Section 4(f)(2).[29]

In any event, there is nothing in TWA's seniority system that requires that over-age pilots be retired. That system is reflected in the company bidding procedure under which vacancies are awarded on the basis of seniority, determined by the date the pilot was hired by the company. It follows that if over-age captains were permitted freely to bid on flight engineer vacancies as they become available, each would eventually be successful precisely because seniority governs the award of bids. It is undisputed that the plaintiffs, and TWA captains generally, are at or near the top of the seniority list.[30] Thus, as the court of appeals observed, respondents "do not challenge the operation of the seniority system, but their summary exclusion from it at age 60" (Pet. App. A25-A26). The action which has injured respondents, and which is being challenged here, is TWA's decision that pilots in captain status when they reach 60 must be severed from employment and thus forfeit their seniority. It is this decision which underlies the company's requirement that a captain approaching age 60, in order to con-

[29] TWA attempts to answer this objection by asserting (Br. 28 n.35) that it is the FAA Age 60 Rule, rather than its seniority system, that "require[s] or permit[s]" the involuntary retirement of the over-age pilots. But the FAA Rule no more mandates retirement of these employees than the FAA Rule requiring that captains and co-pilots possess a first-class medical certificate mandates that those unable to maintain such certification be severed from the work force (see page 11, *supra*).

As the FAA has itself pointed out (C.A. App. 547-548): "[the] Age 60 rule does not ground a pilot or totally deny him the right to work as a pilot. He can be employed by an air carrier as a check pilot or flight instructor, provided he is not concurrently serving as a pilot flight crewmember in an operation under Part 121."

[30] For example, respondents Clark, Parkhill, and Thurston had 34, 33, and 36 years of seniority, respectively, when they were forced to retire (C.A. App. 919-921, 911-912, 903-905).

tinue working, must be awarded a flight engineer vacancy with an effective date prior to his 60th birthday (page 7, *supra*). This requirement precipitated the involuntary retirement of respondent captains, who failed to satisfy it. And it is this requirement, together with the more recent requirement that successful bidders fulfill their bids "in a timely manner," which has resulted in the constructive demotion of captains approaching 60, inasmuch as TWA typically now sends them through training and into the less prestigious and lower-paying flight engineer positions prior to their 60th birthdays.

TWA's Age 60 Policy cannot be legitimately explained by its seniority system nor defended under Section 4(f)(2) because, as the court below recognized (Pet. App. A26), TWA's decision to retire its captains when they reach 60 "is in no way mandated by the negotiated seniority system." Rather, the seniority provisions of the TWA-ALPA Working Agreement merely state that "[a]ny pilot whose services with the company are permanently severed shall forfeit his seniority rights" (page 8, *supra*). While it is certainly true that a rule governing the circumstances under which an employee's seniority is forfeited may be considered part of a "seniority system" (*California Brewers Association* v. *Bryant*, 444 U.S. 598 (1980)), nothing in the Working Agreement requires TWA to "permanently sever[]" a pilot's employment simply because he can no longer serve as a captain or first officer.

It is clear that a successful defense of age-based personnel actions under Section 4(f)(2) requires a showing that the employer's action complied with an express provision of the seniority system or benefit plan relied upon. *Sexton* v. *Beatrice Foods Co.*, 630 F.2d 478, 483-488 (7th Cir. 1980); *EEOC* v. *Baltimore & O. Ry.*, 632 F.2d 1107, 1111 (4th Cir. 1980), cert. denied, 454 U.S. 825 (1981) ("A successful 4(f)(2) defense [under the pre-Amendment Act (see pages 22-23, *supra*)] requires that the involuntary termination be pursuant to the pension plan's design—not to a discretionary act of management."). Cf.

United Air Lines, Inc. v. *McMann*, 434 U.S. 192, 196-197 (1977). TWA therefore cannot invoke the seniority system as a "legitimate, non-discriminatory" reason for the forced retirement and refusal to transfer age 60 captains, nor can those actions be defended as having been taken "to observe" the terms of its seniority system.[31]

C. TWA's Actions Are Not Covered by the Bona Fide Occupational Qualification Exemption in Section 4(f)(1) of the ADEA

TWA involuntarily retires 60-year old captains and ex-pilots who seek continued employment as flight engineers —a job excluded from the FAA Rule, and for which TWA has never claimed that age 60 is a bona fide occupational qualification (BFOQ) (and, indeed, a job in which TWA employs persons older than 60). At the same time, the company uniformly retains younger pilots when non-age related factors render them incapable of occupying their present positions. In its brief as cross-petitioner (Br. at 4), ALPA attempts to justify this discrimination under Section 4(f)(1) of the ADEA, because age 60

---

[31] Petitioner TWA also argues (Br. 19-21, 25 & n.30) that in ruling that its Age 60 policy was prima facie discriminatory, the court below improperly interfered with the company's seniority system and its collective bargaining agreement with ALPA. For the reasons stated in the text, the court's ruling does not implicate, much less denigrate, TWA's seniority system.

Nor does the court's ruling otherwise "ignore[] the need for TWA" to comply both with the ADEA and with "the legitimate considerations of the Working Agreement" (TWA Br. 20-21). The court properly faulted TWA for retiring 60-year-old captains when the Working Agreement provided for the continued employment of all other pilots disqualified from their present positions for non-age related reasons. The Agreement itself reserves to the company the right to keep those captains on the rolls beyond age 60 (pages 6-7, *supra*; see also Pet. App. A50-51; A13-A16). Contrary to TWA's implication, the court did not require the company to deviate from its Working Agreement by giving those captains an unconditional right to "displace" junior flight engineers. Whether that type of movement, rather than bidding for vacancies beyond age 60, should be ordered as "appropriate equitable relief" is a remedial question to be decided on remand (see note 27, *supra*).

is a BFOQ for the captain position.[20] This argument, which is supported neither by the text of the ADEA nor its legislative history, was properly rejected by the court below.

1. Section 4(a)(1) of the ADEA (29 U.S.C. 623(a)(1)) prohibits an employer from discharging or otherwise discriminating against any individual on the basis of age. Section 4(f)(1) permits an employer to "take any action otherwise prohibited * * * where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" (29 U.S.C. 623(f)(1)). Because the BFOQ provision creates an exception to the statute's general prohibition against discrimination based on age, it must be narrowly construed and may be invoked only if an employer proves "plainly and unmistakably" that its employment practice meets the terms and spirit of the provision. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 748 (7th Cir. 1983), cert. denied, No. 83-205 (Nov. 28, 1983); *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), cert. denied, 434 U.S. 966 (1977); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 230 (5th Cir. 1976).

As the court below observed, the "terms of [§ 4(f)(1)] plainly reveal its purpose, which is to excuse only

[20] The EEOC has not, in this litigation, challenged the claim that the FAA's Age 60 Rule establishes a BFOQ for captains and first officers of commercial airlines and we do not do so here. Although the EEOC has questioned the justification for such a flat ban on the service of older pilots (see Comments of Constance Dupre, Associate General Counsel, EEOC, published in *Report of the National Institute on Aging Panel on the Experienced Pilots Study* C109-C115 (Dep't of Health & Human Services, Bethesda, Md. Aug. 1981)), it is clear that the regulation requires commercial airlines to comply with its terms. It does not, however, establish a BFOQ for flight deck positions not covered by the Rule (*Stowe v. Western Air Lines, Inc.*, 544 F. Supp. 33, aff'd sub nom. *Criswell v. Western Airlines*, 709 F.2d 544 (9th Cir. 1983), petition for cert. pending, No. 83-1545).

those age-based actions against employees that are related to the "particular job" (Pet. App. A28). Under the terms of Section 4(f)(1), the company could not, for example, refuse to consider an employment application submitted by a 60-year-old individual for a flight engineer position on the ground that age 60 is a BFOQ for the captain and co-pilot positions. Similarly, it cannot rely on the BFOQ exemption to sever from the work force because of his age a captain who seeks to transfer to a flight engineer vacancy. Section 4(a)(1) requires that the captain, like the applicant, be considered for the flight engineer seat under the same terms as other younger employees seeking transfers. He may not be refused that consideration simply because he is subject to a BFOQ under Section 4(f)(1) for an occupation to which he no longer makes any claim.

ALPA's contrary and utterly novel reading of Section 4(f)(1) rests on the assertion that the section permits an employer to "take any action otherwise prohibited"—and that "any action" must include involuntary retirement (ALPA Br. 15-18). This argument overlooks the fact that "any action" may be taken only "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" (29 U.S.C. 623(f)(1)). That language qualifies and limits the scope of the defense, and precludes its application here. In applying the section, the critical issue is whether the employer's age-based action implements an occupational qualification that is reasonably necessary; ALPA's construction would allow an age qualification justified in one occupation to be applied to others even "where" the age qualification is not "reasonably necessary" to "the particular business" of the other occupations. This reading ignores the terms and violates the purpose of the section, since it limits employment of older workers without serving any reasonable requirements of the employer.

The court below was thus faithful to the letter and spirit of Section 4(f)(1) in concluding that it does not sanction "an age-based refusal to consider a transfer ap-

plication submitted by a 60-year old downbidding captain, merely because age 60 is a BFOQ for the captain's former job" (Pet. App. A29). The court's holding does not "read a limitation into Section 4(f)(1)" (ALPA Br. 19); it merely applies the limitation inherent in its language: the only age-based actions that can be justified are those "reasonably necessary" to the demands of the job for which age is a BFOQ. Cf. *Tuohy* v. *Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982).

2. Nothing in the legislative history of the 1978 Amendments to the Act is inconsistent with this interpretation. The amendments were designed to strengthen and extend the ADEA. A primary impetus for the amendments was to overturn this Court's decision in *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192 (1977), which construed Section 4(f)(2) of the Act to permit the involuntary retirement of 60-year-old employees pursuant to a bona fide retirement plan that predated the 1967 enactment of the ADEA. The Amendments precluded such forced early retirement, and extended the Act's protections to persons up to age 70. H.R. Conf. Rep. 95-950, 95th Cong., 2d Sess. 8 (1978); H.R. Rep. 95-527, 95th Cong., 1st Sess. 1 (1977). Congress strongly reaffirmed the need "to insure that older individuals who desire to work will not be denied employment opportunities solely on the basis of age" (S. Rep. 95-493, 95th Cong., 1st Sess. 1 (1977)). It would be incongruous in the extreme to conclude—as ALPA urges—that at the same time, Congress authorized the practices challenged here: the forced retirement of employees subject to a BFOQ in their original position, and the refusal to consider them, on the same terms as other employees, for jobs for which they remain qualified.

ALPA relies (Br. 9-10) on the legislative history surrounding a proposed Senate amendment to Section 4(f)(1) that would have added mandatory retirement to actions permitted in reliance on a BFOQ: in particular, ALPA cites the statement of the Conference Committee that the conferees agreed to withdraw the amendment

because it "neither added to nor worked any change upon present law" (H.R. Conf. Rep. 95-950, *supra*, at 7). But that statement sheds no light on what the "present law" requires with respect to age-based disparities in job transfer rights.

Similarly, the passages upon which ALPA relies (Br. 10-11) from the House Committee Report and floor debates referring to "jobs with unusually high demands" and "hazardous occupations" as examples of jobs from which mandatory retirement might be justified under Section 4(f)(1) (H.R. Rep. 95-527, *supra*, at 12; 123 Cong. Rec. 30566 (1977); 123 Cong. Rec. 34296 (1977)) do not support ALPA's interpretation. They simply indicate that nothing in the Act or the proposed Amendments requires an employer either to retain an employee in a position with a BFOQ lower than his age, or to give him special transfer rights not available to other younger employees. But neither these statements, nor the explanation for the withdrawal of the amendments to Section 4(f)(1) discussed above, indicate that Congress ever addressed the practice involved in this case—the discriminatory limitation of the opportunity to transfer from positions subject to a BFOQ to others not so subject. Still less do they indicate that Congress approved of this practice, which is entirely inconsistent with the ADEA's fundamental proscription of discriminatory working conditions (29 U.S.C. 623(a)(1)). Instead, we submit that Congress never specifically addressed the issue, but generally assumed that the BFOQ defense would apply only to actions relating to the particular job to which it applied.[20] As this

[20] The House Report reflects Congress's understanding that Section 4(f)(1) excuses age-based action only when the age qualification is "reasonably necessary to the normal operation of a particular activity * * *. [I]n some jobs with unusually high demands, age may be considered a factor in hiring and retaining workers" (H.R. Rep. 95-527, *supra*, at 12). This language strongly suggests that the BFOQ defense is job specific: that age may not be considered in determining whether to transfer workers to other jobs for which age is not a BFOQ.

Court recently emphasized in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 4-5 (footnotes omitted): "[I]f • • • Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administration interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." As we have shown, the agency answer here is entirely justified by the statute and the policies it is designed to further.[36]

---

[36] Our construction comports with the government's consistent position on the relationship between the FAA rule and the ADEA's requirements. In a series of opinion letters issued on May 4, 1979, the Department of Labor explained (C.A. App. 971, 869-871):

> While the FAA Rule does not permit persons over age 60 to function as pilots in scheduled carrier operations, it does not require compulsory retirement. Thus, pilots approaching age 60 who wish to continue employment in positions which do not fall within the Age 60 rule (such as flight instructor, check pilot, or flight engineer) must be considered for such employment without regard to age on the same basis as other employees or applicants.
>
> • • • • •
>
> In summary, while the ADEA does not require that a carrier provide, in each and every case, an alternative assignment for pilots subject to the FAA's Age 60 Rule, such persons must be considered for reassignment (or training prior to reassignment) to positions not covered by the Rule. Age must not be either a direct or indirect consideration; the 60-year-old pilot must be treated on the same basis as other employees or applicants for employment.

This interpretation remained in effect after the EEOC assumed jurisdiction over the ADEA in July 1979 (see 44 Fed. Reg. 37974 (1979)) and, though technically superseded since the EEOC's promulgation of its own ADEA regulations in 1981 (see 46 Fed. Reg. 47724 (1981)), continues to reflect the Commission's position on this issue.

II. THE COURT BELOW PROPERLY AWARDED LIQUIDATED DAMAGES TO THE PLAINTIFFS

A. A Company That Intentionally Treats Workers Less Favorably Because Of Their Age Is Liable For Liquidated Damages If It Knew Or Should Have Known That Its Actions Were Governed By The ADEA

Section 7(b) of the ADEA provides that the ADEA "shall be enforced in accordance with the powers, remedies and procedures provided in sections 11(b), 16 (except for subsection (a) thereof) and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211 (b), 216, 217)" (Pub. L. No. 90-202, 81 Stat. 604, 29 U.S.C. 626(b)). Sections 16(b) and 16(c) of the FLSA authorize the recovery of back wages and benefits, as well as "an additional equal amount as liquidated damages."[37] This provision for liquidated damages is, however, modified by Section 7(b) of the ADEA, which states that such damages are to be awarded "only in cases of willful violations."[38]

---

[37] TWA incorrectly contends (Br. 37 n.49) that the government cannot recover liquidated damages under the ADEA because Section 16(c) of the FLSA did not authorize such recovery in 1967, when the ADEA was enacted. *Hazen* v. *Welch*, 358 U.S. 203 (1958), on which TWA relies, refers, in dicta, to the "well settled canon" that where a statute is adopted by reference, the adoption "does not include subsequent additions or modifications of the statute so taken unless it does so by express intent." 358 U.S. at 214. There is such express intent here. The explicit incorporation of the FLSA enforcement mechanisms "as amended" makes clear that the ADEA is to be enforced under the FLSA as it may read thereafter. In addition, Congress was fully aware of the interrelationship of the two Acts when it authorized the government to obtain liquidated damages under Section 16(c) in 1974; the Fair Labor Standards Amendments of 1974 explicitly amended both the FLSA and the ADEA. Pub. L. No. 93-259, §§ 26, 28, 88 Stat. 73, 74; H.R. Rep. 93-913, 93d Cong., 2d Sess. 40 (1974); *EEOC* v. *Gilberto, Inc.*, 615 F.2d 985, 989 (4th Cir. 1980).

[38] In contrast, Section 11 of the Portal-to-Portal Pay Act of 1947, 29 U.S.C. 260, grants trial courts discretion to deny or reduce liquidated damage awards in FLSA suits under Section 16(c) if

The court below correctly awarded liquidated damages. We submit that where an employer intentionally discriminates on the basis of age, the violation is willful if the employer knew or should have known that its actions were governed by the Act. Because TWA obviously knew that its Age 60 Policy was governed by the ADEA as amended in 1978, it is liable for liquidated damages

1. The term "willful violations" appears in a similar civil context in Section 6(a) of the Portal-to-Portal Pay Act of 1947, as amended, 29 U.S.C. 255(a), which extends the limitations period from two to three years for "willful violations" of the FLSA. This statute of limitations provision, enacted one year before the ADEA in 1966,[27] is specifically incorporated into the ADEA (§ 7(e)(1), 29 U.S.C. 626(e)(1)).

The courts of appeals have uniformly held that Congress used the term "willful violations" in Section 6(a) of the Portal-to-Portal Pay Act to describe situations in which the employer took actions in fact prohibited by the statute and was, or should have been, cognizant of an appreciable possibility that the employees involved were covered by the statutory provisions. *EEOC* v. *Central Kansas Medical Center*, 705 F.2d 1271, 1274 (10th Cir. 1983); *Marshall* v. *Erie Food Services, Inc.*, 672 F.2d 229, 230 (1st Cir. 1982); *Marshall* v. *Union Pac. Motor Freight Co.*, 650 F.2d 1085, 1092-1093 (9th Cir. 1981); *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir.), cert. denied, 409 U.S. 948 (1972); *Donovan* v. *Carls Drug Co.*, 703 F.2d 650, 652 (2d Cir. 1983); see

---

the employer establishes a good faith defense to the violations of the wage-hour law. As this Court has noted, "[a]lthough § 7(e) of the ADEA, 29 U.S.C. § 626(e), expressly incorporates §§ 6 and 10 of the Portal-to-Portal Pay Act * * *, the ADEA does not make any reference to § 11, 29 U.S.C. § 260." *Lorillard* v. *Pons*, 434 U.S. 575, 582 n.8 (1978). Of the eight circuits that have addressed the issue, only the Fifth Circuit has held 29 U.S.C. 260 applicable to ADEA actions. *Rose* v. *National Cash Register Corp.*, 703 F.2d 225, 228 (6th Cir. 1983) and cases collected therein.

[27] Pub. L. No. 89-601, Tit. VI, § 601(b), 80 Stat. 844.

Spagnuolo v. *Whirlpool Corp.*, 641 F.2d 1109, 1113-1114 (4th Cir. 1981). Cf. *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 461-462 (D.C. Cir. 1976) ("at the very least the employer's noncompliance is willful when he is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt").[28]

Equally well-recognized is the "natural presumption that identical words used in different parts of the same Act are intended to have the same meaning." *Atlantic Cleaners & Dyers* v. *United States, Inc.*, 286 U.S. 427, 433 (1932). See 2A C. Sands, *Sutherland Statutes and Statutory Construction* § 51.03 & n.6 (4th ed. 1973). Here, the same Congress that added Section 6(a) to the Portal-to-Portal Pay Act in 1966—using the term "willful violations" broadly to describe actions that in fact violate the statute when taken with knowledge of an appreciable possibility that the statute applies—one year later incorporated that provision into the ADEA and at the same time determined that liquidated damages would be available for such "willful violations." There is thus a strong presumption that Congress intended that the term have the same meaning in Section 7(b) as it had in Section 7(e)(1): that liquidated damages should be awarded

---

[28] In addition, the courts have unanimously rejected any specific intent requirement. *E.g.*, *Marshall* v. *Erie Food Services*, 672 F.2d at 231 ("[e]ither bad faith nor knowledge that a particular practice violates the Act is required"); *Marshall* v. *Union Pac. Motor Freight Co.*, 650 F.2d at 1092-1093 ("Reliance on erroneous advice is no bar to a finding of a 'willful' violation, except for a good faith reliance upon advice rendered by an appropriate government agency."); *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d at 1141-1142 (reliance on counsel's advice no defense); *Laffey* v. *Northwest Airlines*, 567 F.2d 429, 461-462 (D.C. Cir. 1976) (employer's noncompliance is willful when he "consciously and voluntarily charts a course which turns out to be wrong"); *Donovan* v. *Carl's Drug Co.*, 703 F.2d at 652 ("neither a good faith belief in the lawfulness of his * * * regulations nor complete ignorance of their invalidity shield the employer"); see *Spagnuolo* v. *Whirlpool Corp.*, 641 F.2d at 1113-1114 (employer's good faith belief in the lawfulness of his policies is no defense).

upon a showing that the employer knew the ADEA governed its actions. Contrary to the claim of TWA (Br. 33-35) and its amici (Equal Employment Advisory Council (Br. 8-22); United States Chamber of Commerce (Br. 6-10)), nothing in the legislative history of the ADEA's liquidated damages provision defeats this presumption, or suggests that it was to apply only when the employer intended to violate the Act. Such a specific intent requirement is inconsistent with court of appeals decisions interpreting Section 7(b).

2. Section 7(b)'s provision for liquidated damages derived from an amendment proposed by Senator Javits to the Administration's age discrimination bill. S. 830 and H.R. 3651, 90th Cong., 1st Sess. (1977); 113 Cong. Rec. 2794-2796 (1967). As introduced, the bill would have imposed criminal penalties for willful violations (*id.* § 11(b), 113 Cong. Rec. 2796). Senator Javits' substitute bill replaced this criminal provision with the civil remedy of liquidated damages (113 Cong. Rec. 7077 (1967) (Amendment No. 125); S. 830, 90th Cong., 1st Sess. § 7(b) (1967) as reported from the Senate Committee on Labor and Public Welfare. 113 Cong. Rec. 31248 (1967)).

The change from criminal to civil penalties was designed to facilitate enforcement by avoiding "difficult problems of proof which would arise under a criminal provision,"[40] and the possible invocation of Fifth Amendment protection that could impede investigation, conciliation, and enforcement (113 Cong. Rec. 7076 (1967) (remarks of Sen. Javits); see also *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 27 (1967) (*Senate*

[40] Although a criminal sanction can be imposed only after guilt is established by proof beyond a reasonable doubt (*In re Winship*, 397 U.S. 358 (1970)), civil damages may be assessed if a violation is shown by a preponderance of the evidence (see, *e.g.*, *Strachan Shipping Co. v. Shea*, 406 F.2d 921, 922 (5th Cir.), cert. denied, 396 U.S. 821 (1969)).

Hearings)).[40] The change was thus designed to broaden, not to narrow, the applicability of the liquidated damages provision, to assure that it would "furnish an effective deterrent to willful violations" (113 Cong. Rec. 7076 (1967) (remarks of Sen. Javits)).

This purpose would not be achieved by limiting the recovery of liquidated damages to those situations in which the employer can be shown to have intended to violate the Act. The discrimination that Congress sought to deter was generally understood to result not from malice or intolerance, but from unfounded assumptions and ignorance regarding the abilities of older workers. *Age Discrimination in Employment, Hearings on H.R. 3651, et al., Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess., 6, 8, 13 (1967) (*House Hearings*).[41] To serve as an

[40] Sen. Javits (*id.* at 27) there testified that "there is no use giving people the argument that it has criminal sanctions as a reason for refusing to cooperate or testify in investigations or proceedings."

[41] See also U.S. Department of Labor, *The Older American Worker; Age Discrimination in Employment, A Report of the Secretary of Labor to the Congress under Section 715 of the Civil Rights Act of 1964*, at 2, 3 (1965) ("discrimination in the nonemployment of older workers involves their rejection because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions* * * *. The discrimination older workers have most to fear * * * is not from any employer malice"); 113 Cong. Rec. 31254 (1967) (Sen. Javits) ("What we have learned, essentially, is that a great deal of the problem stems from pure ignorance; there is simply the widespread irrational belief that once men and women are past a certain age they are no longer capable."); *id.* at 31256 (Sen. Young) ("Medical science and other factors have vastly increased * * * life expectancy. * * * [The] view of 65 being the proper age for retirement * * * [is] outdated and outmoded."; *id.* at 34740 (Rep. Perkins) (statute addresses "long-standing misconception about the employability of older workers and certain economic factors"); *id.* at 34742 (Rep. Burke) ("Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. These result * * * [from] feelings about a person en-

effective deterrent to discrimination that Congress understood to be more thoughtless than malicious, liquidated damages must be available on a basis that will prompt "employers everywhere • • • [to] take a look at their • • • policies" (113 Cong. Rec. 31257 (1967) (Sen. Young)), and "bring about a basic change in public attitude toward the value of the older worker." *Id.* at 34744 (Rep. Hawkins). Defining a violation as "willful" whenever the employer intentionally discriminates on the basis of age and is, or should have been, aware of the applicability of the ADEA properly promotes this deterrent purpose.

TWA (Br. 34) and amici (EEAC Br. 11-12; Ch. Com. Br. 8) argue that the ADEA liquidated damages provision is punitive, and so should be available only when the employer can be shown to have intentionally violated the Act.[42] But the legislative history of the liquidated damages provision in the ADEA—as in the FLSA—shows that such damages are designed to provide full compensation to the employee, rather than primarily to punish the employer. Thus, Congress focused on the need to be fair to the *employee*, and to provide him full compensation for

---

tirely unrelated to his ability to do a job. This is hardly a problem for the older jobseeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance").

[42] Their related argument (TWA Br. 31-33; EEAC Br. 8, 22; Ch. Com. Br. 7-8)—that the imposition of liquidated damages whenever there is a finding of discriminatory treatment with knowledge of the applicability of the Act leaves the "willfulness" limitation out of the Act—has no more merit here than it does in the Portal-to-Portal Act context. There, the courts have consistently rejected the argument, recognizing that the only employers who can claim not to have acted willfully are those "who were unwittingly intercepted by the [newly expanded] Act" (*Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d at 461; see cases cited, page 32, *supra*). In addition, it may well be that where an employee has shown that facially neutral employer practices have a discriminatory impact, the court might conclude that the employer had no reason to be aware of the applicability of the ADEA to those practices. In that case, liquidated damages would not be available.

nonpecuniary damages not readily calculable, including emotional injuries such as humiliation and loss of self respect. H.R. Conf. Rep. 95-950, 95th Cong., 2d Sess. 14 (1978); cf. D. Dobbs, *Handbook on the Law of Remedies* 135-136 (1973); *Kolb* v. *Goldring*, 694 F.2d 869, 872 n.2 (1st Cir. 1982); *Gibson* v. *Mohawk Rubber Co.*, 695 F.2d 1093, 1102 (8th Cir. 1982). The legislative purpose would be defeated if the mere fact that an employer had an arguable legal position were held to preclude application of the liquidated damages provision to its deliberate age-based disparate treatment of employees covered by the Act.

Even if the legislative history were less explicit, liquidated damages under the ADEA should be deemed to serve the same compensatory purpose this Court recognized in the FLSA provisions from which they were taken (*Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572, 583 (1942)).[43] As the Court noted in *Lorillard* v. *Pons*, 434 U.S. at 581:

> [W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretations given to the incorporated law, at least insofar as it affects the new statute.
>
> That presumption is particularly appropriate here since, in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretations and a willingness to

---

[43] This purpose was not altered by Congress's later enactment of Section 11 of the Portal-to-Portal Pay Act, 29 U.S.C. 260, which eliminated the mandatory nature of the award and gave trial courts discretion to deny or limit liquidated damages where an employer shows that it acted in good faith. See H.R. Rep. 71, 80th Cong., 1st Sess. 3, 8 (1947); *Thompson* v. *Sawyer*, 678 F.2d 257, 281 (D.C. Cir. 1982) ("Nothing in the statutory history of the Portal Pay Act suggests that Congress was dissatisfied with the determination that liquidated damages were compensatory. • • • Allow[ing] courts to balance compensating employees against imposing costs on employers hardly transforms the award to a penalty." (citations and footnote omitted)).

depart from those provisions regarded as undesirable or inappropriate for incorporation.

The fact that Congress changed the automatic liquidated damages provision in the FLSA to one providing liquidated damages for willful violations does not imply either that liquidated damages were not to be considered compensatory, or that the words used were to have a different meaning in the new context. Instead, Congress simply concluded that the narrow class of employers who were not "willful" violators under Section 6(a) of the Portal-to-Portal Act should also be excused from providing full compensation to employees injured by actions taken without any consciousness that they might violate the ADEA.[40]

3. Several courts of appeals have recognized that the history and statutory context of Section 7(b)—against which its use of the term "willful violations" must be construed (*Spies* v. *United States*, 317 U.S. 492, 497 (1943); *United States* v. *Bishop*, 412 U.S. 346, 356 (1973))—fully support the presumption that Congress meant, by requiring liquidated damages for "willful violations" in Section 7(b), to cover precisely the same "willful violations" it made subject to the longer statute of limitations in 7(e): intentionally discriminatory acts committed with actual or constructive knowledge that the ADEA applied.[41] The Fourth, Fifth, and Tenth Circuits have accordingly applied the statute of limitations standard in the liquidated damages context. *Crosland* v. *Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 208, 217 (4th Cir. 1982); *Hedrick* v. *Hercules*, 658 F.2d 1088, 1096 (5th Cir. 1981); *Mistretta* v. *Sandia Corp.*, 639 F.2d 588, 595 (10th Cir. 1980). See also *Blackwell* v. *Sun Electric Corp.*, 696 F.2d 1176, 1184-1185 (6th Cir. 1983) (crucial question is "whether the employer deliberately, intentionally, and knowingly discharged the employee because of his age"); *Kelly* v. *American Standard, Inc.*, 640 F.2d 974, 980 (9th Cir. 1981) (same, semble).

Conversely, the "specific intent" standard urged by TWA and its amici has been roundly rejected. Of the nine courts of appeals that have addressed the question, all but one have agreed that proof of specific intent to violate the ADEA is not a precondition to an award of liquidated damages. *Blackwell* v. *Sun Electric Corp.*, 696 F.2d at 1184-1185; *Sprock* v. *Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149, 155-156 (7th Cir. 1981); *Hedrick* v. *Hercules*, 658 F.2d at 1096; *Spagnuolo* v. *Whirlpool Corp.*, 641 F.2d at 1114; *Kelly* v. *American Standard, Inc.*, 640 F.2d at 980; *Mistretta* v. *Sandia Corp.*, 639 F.2d at 595; *Wehr* v. *Burroughs Corp.*, 619 F.2d 276, 283 (1980); *Goodman* v. *Heublein, Inc.*, 645

---

[40] The legislative history of Section 7(b), read against the law under Section 16(a) of the FLSA, also supports the standard urged here. Under Section 16(a)—which Congress chose not to incorporate into the ADEA—criminal penalties attach for willful violations of the wage-hour law. At the time Congress was enacting the ADEA, the courts had held consistently that this provision did not require that the offense "be committed maleviently, with a bad purpose or an evil mind"; rather, "[i]t is sufficient if the act was deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accidentally or by ordinary negligence." *Nabob Oil Co.* v. *United States*, 190 F.2d 478, 480 (10th Cir.), cert. denied, 342 U.S. 876 (1951); accord, *Herts Driveself Stations* v. *United States*, 150 F.2d 923, 928-929 (8th Cir. 1945); *United States* v. *Fidanian*, 465 F.2d 755, 760 (5th Cir. 1972). Inasmuch as Congress substituted the ADEA's civil remedy of liquidated damages for criminal penalties in order to avoid proof problems (see p. 34, *supra*), Congress could not have intended a more rigorous standard of proof for liquidated damages than for criminal violations of the FLSA.

[41] Although one court has refused to require any proof regarding the defendant's state of mind towards the statute for fear of "encouraging employers to know as little as possible about the ADEA" (*Kelly* v. *American Standard, Inc.*, 640 F.2d 974, 980 (9th Cir. 1981); cf. *Blackwell* v. *Sun Electric Corp.*, 696 F.2d 1176, 1184 (6th Cir. 1983)), only in the rarest cases will employers be deemed to be reasonably unaware of the ADEA. As the court below noted (Pet. App. A34), the Act itself requires employers to post notices of its applicability. 29 U.S.C. 627.

F.2d 127 (2d Cir. 1981), but see *Loeb* v. *Textron*, 600 F.2d 1003, 1020 n.27 (1st Cir. 1979) (dicta)."

B. The Undisputed Facts Of This Case Compel The Conclusion That TWA's Violation Was Willful

The undisputed evidence compels the conclusion that TWA's ADEA violation was "willful" under the definition of that term that Congress clearly intended. Accordingly, the court below properly awarded liquidated

---

" Contrary to TWA's assertion (Br. 31-32), the First Circuit in *Loeb* v. *Textron*, *supra*, which was decided before any court of appeals had considered the issue, did not purport to decide under what circumstances an employer's ADEA violation would be deemed willful. The *Loeb* footnote merely quotes the definition of willfulness from jury instructions concerning mens rea in a criminal context (1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.06, at 384 (3d ed. 1977) which, we submit, is inapposite in civil cases.

Nor does the Seventh Circuit require specific intent (TWA Br. 31-32). That the Seventh Circuit was not setting forth a specific intent requirement in *Sprogis* v. *Milwaukee Boiler Manufacturing Co.*, *supra*, is evidenced by its statement that a violation is willful if the employer's "actions were knowing and voluntary and * * * he knew *or reasonably should have known* that those actions violated the ADEA" (665 F.2d at 156 (emphasis supplied)) and its statement that the test it had articulated "is consistent with the standard endorsed in * * * *Goodman* v. *Heublein*" (*id.* at 155 n.9). *Any* contrary implication was dispelled by the subsequent affirmance of a finding of willfulness that explicitly comported with the Third Circuit's *Wehr* standard, which expressly excludes a showing of specific intent. *Orzel* v. *City of Wauwatosa Fire Dep't*, 697 F.2d 743 (1983), cert. denied, No. 82-205 (Nov. 28, 1983).

Similarly, *Kuyen* v. *Consolidated Edison Co.*, 560 F. Supp. 1141 (S.D.N.Y. 1983), and *Whittlesey* v. *Union Carbide Corp.*, 567 F. Supp. 1320 (S.D. N.Y. 1983), also recognize that constructive knowledge of or disregard for the prescriptions of the ADEA will justify liquidated damages. See *Kuyen*, 560 F. Supp. at 1166 (approving liquidated damages where "the defendant deliberately, intentionally and knowingly discharged plaintiff because of his age, and * * * knew *or should have known* such conduct was unlawful) (emphasis supplied); *Whittlesey*, 567 F. Supp. at 1330 (agreeing that *Kuyen* required a showing that the employer acted with knowledge of the illegality of his action or "at least an inexcusable disregard").

damages at this stage of the case. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982). TWA knew that its Age 60 Policy for the continued employment of all flight deck crew members was governed by the ADEA; indeed, that policy was promulgated in direct response to the 1978 Amendments (Pet. App. A4, A8-A9; pages 4-10, *supra*). Moreover, as we have shown (pages 15-21, *supra*), the policy on its face discriminates against pilots covered by the Act on the basis of their age; it is a policy of explicit age-based disparate treatment.

While the foregoing is sufficient to satisfy the Act's standards in our view, here, as the court below concluded (Pet. App. A33-A34), the evidence also shows that the employer acted with "reckless disregard" for whether his actions violated the ADEA. Specifically, the evidence summarized above shows that the policy originally developed by the responsible TWA official imposed no improper restrictions on the transferring pilots. When that official became incapacitated, his successor, acting on his own personal aversion to the continued service beyond age 60 of pilots in any cockpit position, imposed restrictions on transfers of over age captains without regard to the requirements of the ADEA (pages 4-6, *supra*).

III. A UNION THAT VIOLATES THE ADEA IS LIABLE FOR MONETARY RELIEF

Section 4(c)(3) of the ADEA makes it unlawful for a union "to cause or attempt to cause an employer to discriminate" against a worker protected by the Act. The court below concluded that "ALPA actively campaigned to persuade TWA to retain its age 60 retirement policy for all flight deck positions, opposed TWA's unilateral action in August 1978 to attempt partial compliance with the ADEA" and, subsequent to the 1978 ADEA amendments, "negotiated, signed, and administered a Working Agreement * * * requiring retirement of all flight deck personnel at 60" (Pet. App. A32-A33)."

" As the court below correctly held (Pet. App. A32), ALPA is independently liable as a signatory to the Working Agreement in

ALPA does not here contest this conclusion.[40] Based on this finding of culpability, the court originally concluded that "appellants are entitled to recover back pay * * * against the union" (Pet. App. A34). In response to ALPA's petition for rehearing, however, the court amended its decision to absolve ALPA of any monetary liability, holding that the ADEA does not provide for monetary relief against a union (Pet. App. A37-A39). Relying on *Newman* v. *Northwest Airlines, Inc.*, 28 Fair Empl. Prac. Cas. (BNA) 1488 (N.D. Ill. 1982), and *Brennan* v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057 (S.D.N.Y. 1975), the court reasoned that because unions cannot be sued under Section 16(b) of the FLSA (29 U.S.C. 216(b)), and because Section 16(b) is incorporated into the ADEA, unions cannot be liable for back pay or other monetary relief under the ADEA (Pet. App. A37-A39).

This reasoning ignores the fact that, in addition to Section 16(b) of the FLSA, the ADEA includes three other sources of enforcement authority. The text of these provisions, as well as the legislative history and policies of the ADEA, make clear that unions may be required to

---

effect after the 1978 ADEA amendments, which violated the amended Act by providing for involuntary retirement of pilots at age 60. Cf. *Patterson* v. *American Tobacco*, 535 F.2d 257, 270 (4th Cir.), cert. denied, 429 U.S. 920 (1976) (Title VII); *Taylor* v. *Armco Steel Corp.*, 373 F. Supp. 885 (S.D. Tex. 1973) (same); Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702, 704-705 (1980).

In addition, it is undisputed that ALPA "attempt[ed] to cause" TWA to discriminate against over-age-60 pilots, in violation of Section 4(c), by proposing that TWA furlough over-age-60 flight engineers before other flight engineers, regardless of company seniority, and that over-age-60 flight engineers be assigned a new seniority date corresponding to the date on which they qualify as flight engineers, thus making them most susceptible to lay-off (note 17, *supra*).

[40] ALPA does argue that TWA's actions did not constitute a violation of the ADEA, but it does not pursue the argument made below that the record does not establish the Union's participation in those actions. There is, accordingly, no need for this Court to address that purely factual question.

provide monetary relief to the victims of their discrimination.

A. The Text and The Legislative History of the Act Support the Award of Monetary Relief Against ALPA

Section 7(b) of the ADEA (29 U.S.C. 626(b)) provides that the Act "shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of [the Fair Labor Standards Act], * * * and subsection (c) of this section [29 U.S.C. 626(c)]." Section 16(b) of the FLSA, 29 U.S.C. 216(b), authorizes employees to sue their employer for back pay and liquidated damages. Section 16(c) of the FLSA authorizes government suits for pay and damages; it contains no language providing that only employers may be so sued. Section 17 of the FLSA, 29 U.S.C. 217, grants equitable jurisdiction to the district courts to enjoin violations, and to order payment of back pay. Again, this Section contains no limitation to suits against employers. While the government alone can initiate Section 17 suits under the FLSA (§ 11(a) of the FLSA, 29 U.S.C. 211(a)), this limitation does not apply to the ADEA, because the limiting language of Section 17(a) of the FLSA is not incorporated into the ADEA. Moreover, Section 7(b) of the ADEA specifically authorizes "such [legal and equitable] relief [as may be appropriate] 'i[n] any action brought to enforce th[e] Act'." *See Lorillard* v. *Pons*, 434 U.S. at 581.

Finally, Section 7(c)(1) of the ADEA independently authorizes "[a]ny person aggrieved [to] bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the Act" (29 U.S.C. 626(c)(1)). This section contains no language suggesting that unions may not be sued. Indeed, in striking contrast to Section 16(b) of the FLSA, it refers to "any person aggrieved", rather than to "one or more employees" in describing who is entitled to sue.

Thus, the enforcement provisions of the FLSA, as modified and incorporated into the ADEA by Section 7(b) of that Act, permit a private plaintiff to sue an employer for pay and liquidated damages (FLSA § 16(b)) or any violator—including a union—for injunctive relief (FLSA § 17), which includes back pay. The government may sue any violator for pay and damages (FLSA § 16(c)) or for injunctive relief (FLSA § 17). Finally, Section 7(c)(1) of the ADEA, by expressly permitting a separate private cause of action to provide "such legal or equitable relief as will effectuate the purposes of the Act", eliminates any possible discrepancy between the substantive provisions of Section 4, which apply to unions and employment agencies as well as employers, and the enforcement provisions of Section 7: private plaintiffs may obtain liquidated damages as well as pay from any violator, including employers, unions or employment agencies.

2. The legislative history strongly supports this reading of the statute. As this Court has recognized, the ADEA was a "hybrid" of several approaches. *Lorillard v. Pons*, 434 U.S. at 578. The original administration bill contained the same substantive prohibitions as the resulting statute, but the enforcement provisions were modeled after Section 10 of the National Labor Relations Act (29 U.S.C. 160), and provided for administrative enforcement by the Secretary of Labor. S. 830, *supra*, §§ 4, 7; 113 Cong. Rec. 2794-2795 (1967). Labor unions were clearly answerable for money damages, since the Secretary's authority to order back pay ran against "any person [who] has engaged in an unlawful practice" (S. 830, *supra*, § 7; 113 Cong. Rec. 2795 (1967)).

Opposition to this enforcement scheme came primarily from business groups, not unions.[48] The AFL-CIO did

[48] The employer associations recommended enforcement modeled after the FLSA because they preferred the neutral adjudication of the federal district courts, because Wage and Hour personnel were readily available, and because the procedures were familiar. See *Senate Hearings* 113 (Chamber of Commerce); *id.* at 254 (American Retail Association of America); *id.* at 256 (American Retail

object to any union liability under the ADEA, and accordingly proposed the deletion of Section 4(c) of the administration bill, which outlawed discriminatory labor union practices. Testimony of Andrew J. Biemiller, AFL-CIO Legislative Director, *Senate Hearings* 97; Amendment to Exclude Labor Organizations, *id.* at 100.[49] But, when asked about enforcement procedures, the union representative testified that the choice between the NLRA model—under which unions were unquestionably liable for back pay—and that of the FLSA was not "of critical importance" to the AFL-CIO (Testimony of Kenneth Meiklejohn, *House Hearings* 421). Labor Secretary Wirtz agreed that the differences between the two enforcement schemes were "not basic" and were "more in detail than in the larger effect" (*House Hearings* 13).

The Senate Committee Report provides additional evidence that Congress did not intend to excuse unions from the payment of money judgments. Section 7(e) of the ADEA (29 U.S.C. 626(e)) incorporates by reference Section 10 of the Portal-to-Portal Pay Act of 1947 (29 U.S.C. 259), which provides a defense for the failure to "pay minimum wages or overtime compensation" under the FLSA where the employer proves good faith reliance on an administrative interpretation of the law. While Section 10 by its terms allows only employers to invoke the defense, the Senate Report explicitly states that "[u]nder section 10 of the Portal-to-Portal Pay Act any employer, employment agency, or labor organization that relies in good faith upon written administrative regulations * * * has a valid defense" (emphasis added). S. Rep. 90-723, 90th Cong., 1st Sess. 10 (1967).

Federation); *id.* at 324 (National Association of Manufacturers); *id.* at 336 (National Retail Merchants Association); *House Hearings* 67 (Chamber of Commerce); *id.* at 141 (American Retail Federation). None of these employer representatives suggested that labor unions should be exempted, or that the proposed amendments would have that effect.

[49] Congress subsequently enacted that section verbatim as Section 4(c) of the ADEA (29 U.S.C. 623(c)).

The purpose of Section 10 of the Portal-to-Portal Act is to give protection from money judgments (see Section 2 of the Act, 29 U.S.C. 251); the defense does not affect prospective injunctive actions. *Western Union Telephone Co.* v. *McComb*, 165 F.2d 65, 73 (4th Cir. 1947), cert. denied, 333 U.S. 862 (1948). The statement of the Senate Committee, therefore, is further indication that Congress intended to expose unions to monetary liability for violating the ADEA; if this were not the case, the Senate Committee senselessly extended to unions a defense to claims for which they would not, in any event, be liable.

B. The Policies Of The Act Support Union Liability

A comparison of the underlying purposes of the FLSA and the ADEA further supports the conclusion that there was no intent to limit the monetary liability of unions under the ADEA. The enforcement scheme of the FLSA is designed to deprive employers of the economic benefits they derive from paying substandard wages, and to protect the competitive positions of employers who do comply with the Act. 29 U.S.C. 202(a)(5); *United States* v. *Darby*, 312 U.S. 100, 115 (1941). It is therefore arguable that if unions were held liable for monetary damages under the FLSA, offending employers might be enabled to defeat this statutory purpose by retaining, in whole or part, the fruits of their illegality.[40] There is no comparable countervailing consideration in the statutory goals of the ADEA, since the employer gains no economic benefit from its own or the union's discrimination against older workers. Indeed, in enacting the ADEA, Congress emphasized that older workers are valuable employees, and that discrimination against them is often based on ignorance concerning their true capabilities (see pages 35-36, *supra*).[41]

---

[40] See discussion in our Brief at 19-23 in *Northwest Airlines, Inc.* v. *Transportation Workers of America*, No. 79-1066.

[41] *Newman* v. *Northwest Airlines*, *supra*, relied upon by the court below, therefore wrongly decided that because employees cannot sue

Moreover, the broad purpose of the ADEA, like Title VII, is prophylactic as well as remedial. Cf. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975). The

---

unions for damages under the FLSA, unions are also immune from money judgments under the ADEA. Union liability under the FLSA is simply not determinative under the different legislative scheme and policy of the ADEA. The only other courts that have addressed the issue have held that non-employer defendants which have violated the ADEA are liable for monetary relief, based on the Act's specific grant of jurisdiction to award whatever relief is necessary to effectuate its purposes. *EEOC* v. *AT&T*, 420 F. Supp. 1053, 1069 (D. Minn. 1980), rev'd on other grounds, 661 F.2d 90 (8th Cir. 1981) (union liability); *Brennan* v. *Hughes Personnel, Inc.*, 8 Empl. Prac. Dec. (CCH) ¶ 9571 (W.D. Ky. 1974) (employment agency liability).

Brennan v. *Emerald Restaurant, Inc.*, 410 F. Supp. 1057 (S.D. N.Y. 1975), also cited by the court below, is inapposite. That case dealt with the Equal Pay Act of 1963 (EPA) (29 U.S.C. 206(d)), not the ADEA, and there are substantial differences between the two statutes; the EPA is an amendment to the FLSA and the ADEA is not (*Lorillard* v. *Pons*, 434 U.S. at 578), and unlike the ADEA, the EPA is based on a theory of unjust employer benefit through substandard wages. In any event, *Emerald Restaurant* recognized the possibility of back pay liability as an equitable remedy under Section 17 of the FLSA, citing *Hodgson* v. *Sayer, Inc.*, 326 F. Supp. 371 (D. Md. 1971), aff'd sub nom. *Hodgson* v. *Baltimore Regional Joint Board*, 462 F.2d 280 (4th Cir. 1972). *Sayer* held that unions are subject to back pay liability as an equitable remedy when they violate Section 6(d)(2) of the EPA (29 U.S.C. 206(d)(2)). 326 F. Supp. at 373.

The reasons relied on in *Emerald Restaurant, Inc.*, to limit union liability under the EPA are not applicable here. First, the court pointed to the language of Section 16(b) of the FLSA granting employees the right to sue their employers. 410 F. Supp. at 1059 n.3. Under the enforcement scheme of the ADEA however, this limiting language is not controlling: as we have shown, Section 7(c) of the Act, and Sections 16(c) and 17 of the FLSA as incorporated, are not limited to actions against employers. *Emerald Restaurant* also reasoned that because Sections 16 and 17 of the FLSA refer to wages "unpaid" or "withheld," only employers can be made liable since it is only employers that can fail to pay or withhold wages. 410 F. Supp. at 1062. Whatever the merits of this argument as applied to FLSA or EPA suits, it is unavailing in the ADEA context. Section 7(b) of the ADEA (29 U.S.C. 626(b)) refers more generally to "[a]mounts owing to a person as a result

Act's declaration of policy itself states that it is designed "to promote employment of older persons based on their ability rather than age [as well as] to prohibit arbitrary age discrimination in employment" (29 U.S.C. 621(b)).

As this Court recognized in *Albemarle Paper Co.*, *supra*, the threat of financial liability is essential to fulfilling a prophylactic purpose, because it is the prospect of a monetary award "that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges [of discrimination].'" 422 U.S. at 417-418. See *Owen* v. *City of Independence*, 445 U.S. 622, 651-652 (1980).

Thus, although holding employers monetarily liable may ordinarily be sufficient to fulfill the remedial purpose of the ADEA,[20] exposing unions also to such liability significantly furthers the prophylactic purpose of the statute. The broad prohibitions against union discrimination contained in Section 4(c), (d) and (e) of the Act (29 U.S.C. 623(c), (d) and (e)) are clear evidence of Congress's understanding that labor organizations can play a major role in promoting and maintaining age bias in the work place. Unions will have little incentive to shun such practices unless they are held responsible, along with employers, for the economic injury suffered by the victims of their discrimination.

---

of a violation of this Act" and provides that such amounts "shall be deemed" to be unpaid minimum wages or overtime compensation. Thus, once a violation has been shown, the harm which the violator has caused becomes an amount owing; this amount is then to be treated as if it were unpaid minimum wages or overtime compensation for purposes of collection. Where, as here, the union and the employer have violated the Act, resulting amounts owed to victims of discrimination, both defendants may be held liable for those amounts.

[20] It might not be sufficient in a case involving a union violation of 29 U.S.C. 623(c)(2) by discrimination in the referral of its members for employment. If the employer were not implicated in the violation, the victim's only recourse would be recovery of damages against the union.

CONCLUSION

The judgment of the court of appeals holding that TWA and ALPA violated the ADEA in involuntarily retiring pilots and first officers when they reach 60, and that TWA is liable for liquidated damages, should be affirmed. The judgment that ALPA is not liable for damages should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

JOHNNY J. BUTLER
General Counsel (Acting)

PHILIP B. SKLOVER
Associate General Counsel

SUSAN BUCKINGHAM REILLY
Acting Assistant General Counsel

JEFFREY BANNON
STEPHEN O'ROURKE
Attorneys
Equal Employment Opportunity Commission

JULY 1984

APPENDIX

In addition to the provisions of the Age Discrimination in Employment Act of 1967 (ADEA), as amended (29 U.S.C. 621 *et seq.*) and the Federal Aviation Administration's Regulation set forth at Pet. 2-5, the following statutory provisions are also relevant:

Section 7(c)(1) of the ADEA (29 U.S.C. 626(c)(1)):

> Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Commission to enforce the right of such employee under this chapter.

Section 7(e)(1) of the ADEA (29 U.S.C. 626(e)(1)):

> Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act.

Section 16(b) and (c) of the Fair Labor Standards Act of 1938 (FLSA), as amended (29 U.S.C. 216(b) and (c)), provide in pertinent part:

> (b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against

any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. • • •

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount of liquidated damages. The right provided by subsection (b) to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in any action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary.

Section 17 of the FLSA (29 U.S.C. 217) provides:

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction for cause

shown to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of the Portal-to-Portal Pay Act of 1947).

Section 6(a) of the Portal-to-Portal Pay Act of 1947, as amended (29 U.S.C. 255(a)) provides in pertinent part:

Any action commenced on or after May 14, 1947 to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after the May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

Section 10(a) of the Portal-to-Portal Pay Act of 1947 (29 U.S.C. 259(a)) provides in relevant part:

In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in re-

> lianee on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged.

Section 11 of the Portal-to-Portal Pay Act (29 U.S.C. 260) provides:

> In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

AMICUS CURIAE

BRIEF

MOTION FILED

JUL 6 1984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARRELL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARRELL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN NO. 83-997

ROBERT M. WEINBERG
JEREMIAH A. COLLINS
BERNSTEIN & KADEN
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5290
(Counsel of Record)

WILSON - GIBB PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

In The

Supreme Court of the United States

October Term, 1983

Nos. 83-997, 83-1025

Trans World Airlines, Inc.,
Petitioner,

v.

Harold H. Thurston, Christopher J. Clark, C. A. Parrella, Equal Employment Opportunity Commission and Air Line Pilots Association, International,
Respondents.

Air Line Pilots Association, International,
Petitioner,

v.

Harold H. Thurston, Christopher J. Clark, C. A. Parrella, Equal Employment Opportunity Commission and Trans World Airlines, Inc.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, IN NO. 83-997

The American Federation of Labor and Congress of Industrial Organization (AFL-CIO) respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the position of respondent Air Line Pilots Association, International, in No. 83-997. Counsel for Messrs. Thurston, Clark and Parkhill has declined to consent to the filing of that brief.

The AFL-CIO is a federation of 96 national and international unions having a total membership of approximately 13,500,000 working men and women. The AFL-CIO submits this brief solely to address the issue whether unions may be held liable for monetary relief under the Age Discrimination in Employment Act, a question of obvious importance to the affiliated unions of the AFL-CIO and their members.

Respectfully submitted,

Robert M. Weinberg
Jonathan A. Gillens
Berkman & Kaiser
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Lawrence Gold
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT	2
ARGUMENT	3
CONCLUSION	13

TABLE OF AUTHORITIES

Cases:	Page
Dean v. American Security Ins. Co., 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978)	11
EEOC v. Corry Jamestown Corp., 719 F.2d 1219 (3d Cir. 1983)	6
EEOC v. Ferris State College, 493 F. Supp. 707 (W.D. Mich. 1980)	13
Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806 (8th Cir. 1982)	11
Johnson v. Al Tech Specialties Steel Corp., 731 F.2d 143 (2d Cir. 1984)	10
Lehman v. Nakshian, 453 U.S. 156 (1981)	4, 8
Lorillard v. Pons, 434 U.S. 575 (1978)	*passim*
Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981)	11
Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981)	8
Perrell v. Financeamerica Corp., 726 F.2d 654 (10th Cir. 1984)	11
Pfeiffer v. Essex Wire Corp., 682 F.2d 684 (7th Cir.), *cert. denied*, —— U.S. ——, 103 S.Ct. 453 (1982)	11
Rogers v. Exxon Research & Engineering Co., 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978)	11
Slatin v. Stanford Research Institute, 590 F.2d 1292 (4th Cir. 1979)	11
Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981)	12
Vasquez v. Eastern Air Lines, Inc., 579 F.2d 107 (1st Cir. 1978)	11
Wirtz v. Jones, 340 F.2d 901 (5th Cir. 1965)	6

Statutes:	
Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*	*passim*
Section 7, 29 U.S.C. § 626	*passim*
Section 7(b), 29 U.S.C. § 626(b)	*passim*
Section 7(c), 29 U.S.C. § 626(c)	10

TABLE OF AUTHORITIES—Continued

	Page
Civil Rights Act of 1964, Title VII, 29 U.S.C. § 2000e	2-3, 9, 12
Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*	*passim*
Section 2, 29 U.S.C. § 202	7
Section 6, 29 U.S.C. § 206	4
Section 7, 29 U.S.C. § 207	4
Section 15(a)(3), 29 U.S.C. § 215(a)(3)	11
Section 16, 29 U.S.C. § 216	*passim*
Section 16(b), 29 U.S.C. § 216(b)	4-5, 6, 11-12
Section 16(c), 29 U.S.C. § 216(c)	5, 6, 7-8
Section 17, 29 U.S.C. § 217	*passim*
Portal-to-Portal Act, 29 U.S.C. § 251 *et seq.*	5
Section 11, 29 U.S.C. § 260	5
Pub. L. 81-393, § 15 (1949)	6
Pub. L. 87-30, § 12(b) (1961)	6

Legislative History:	
S. Rep. No. 640, 81st Cong., 1st Sess. (1949)	6, 8
H. R. Rep. No. 75, 87th Cong., 1st Sess. (1961)	6, 7, 8
S. Rep. No. 145, 87th Cong., 1st Sess. (1961)	6, 7, 8
H. R. Conf. Rep. No. 327, 87th Cong., 1st Sess. (1961)	7
H. R. Conf. Rep. No. 950, 95th Cong., 2d Sess. (1978)	4

In The

Supreme Court of the United States

October Term, 1983

Nos. 83-997, 83-1325

Trans World Airlines, Inc.,
Petitioner,

v.

Harold H. Thurston, Christopher J. Clark, C. A. Parkhill, Equal Employment Opportunity Commission and Air Line Pilots Association, International,
Respondents.

Air Line Pilots Association, International,
Petitioner,

v.

Harold H. Thurston, Christopher J. Clark, C. A. Parkhill, Equal Employment Opportunity Commission and Trans World Airlines, Inc.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, IN NO. 83-997

SUMMARY OF ARGUMENT

1. Section 7(b) of the Age Discrimination in Employment Act ("ADEA") requires that all "amounts owing" under that Act be treated for purposes of remedy as unpaid minimum wages or overtime compensation under §§ 16 and 17 of the Fair Labor Standards Act ("FLSA").

2. Sections 16 and 17 of the FLSA provide in turn that in an action for unpaid minimum wages or overtime compensation it is the wronged employee's employer who is solely liable for a monetary award. That the employer is the sole source for an award of monetary relief in such FLSA actions is not happenstance but rather a direct expression of the point of the Act as a whole. As the legislative history of the FLSA shows, Congress was concerned that employers who pay employees less than the minimum wage or less than the required amount of overtime compensation would achieve an unfair economic advantage over competitors who abide by the requirements of the law. Such an unfair competitive advantage can only be removed if an employer is made to bear the full responsibility for paying what was wrongfully withheld.

3. Congress' choice to incorporate the FLSA's remedial scheme for unpaid minimum wages and overtime compensation into § 7 of the ADEA was an informed and carefully considered one. As this Court has pointed out, "In enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1981). "This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA." *Id.* at 582.

Congress used Title VII of the Civil Rights Act of 1964 as the model for the scheme of substantive prohibitions

enacted in the ADEA. But in shaping the ADEA Congress rejected the remedial scheme of Title VII, which provides for monetary remedies against unions. Instead, Congress adopted, indeed incorporated, the remedial scheme of the FLSA, which has a different remedial premise from that of Title VII. Against this background, Congress must be understood to have adopted not only the words of the FLSA but also its remedial premise: that the employer is to bear the full monetary consequences of his wrongful conduct.

4. There is no one "correct" remedial scheme for a statute such as ADEA. There is legitimate room for debate whether the FLSA scheme or some other scheme is best suited for enforcement of the ADEA. Whatever the relative wisdom of the various options, the choice is for Congress to make. By incorporating the FLSA provisions governing monetary relief for unpaid minimum wages and overtime compensation, Congress chose to place monetary liability for violations of the ADEA solely upon the employer.

ARGUMENT

The court below held that in Age Discrimination In Employment Act cases employers are solely liable for backpay found due and owing to their employees. That holding is correct as we now show.[1]

1. In *Lorillard* v. *Pons*, 434 U.S. 575, 578-79 (1978), this Court recognized that "[p]ursuant to § 7(b) of the

---

[1] In this brief we address the third question stated by Trans World Airlines in its opening brief:

> 3. Whether a labor union which jointly violates the Age Discrimination in Employment Act with an employer is absolved as a matter of law from liability for back pay?

We note at the outset, however, that none of the plaintiffs in this case has raised that question. That being so, we submit that here, as in *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 91-95 & n.20 (1981), an employer may not ask this Court to determine whether the plaintiffs are granted a right to recover against a union.

[ADEA], violations of the ADEA generally are to be treated as vio'ations of the FLSA. . . . [A]nd the rights created by the ADEA are to be 'enforced in accordance with the powers, remedies and procedures' of specified sections of the FLSA." See also *Lehman v. Nakshian*, 453 U.S. 156, 163 (1981). And, that provision is the only one that specifies the monetary relief to be accorded for ADEA violations. Thus, § 7(b) of the ADEA and the provisions of the FLSA incorporated therein control this case.

Of particular pertinence here, § 7(b) of the ADEA expressly provides: "Amounts owing to a person as a result of a violation of [the ADEA] shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title [*i.e.*, §§ 16 and 17 of the FLSA]." As the unqualified term "amounts owing" indicates, Congress intended all possible "items of pecuniary or economic loss such as wages, fringe, and other job-related benefits" under the ADEA to be treated as unpaid minimum wages or overtime compensation. H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 13 (1978). Section 7(b), then, constitutes a "direct[ion] that actions for lost wages under the ADEA be treated as actions for unpaid minimum wages or overtime compensation under the FLSA. . . ." *Lorillard*, 434 U.S. at 582.

2. Sections 16 and 17 of the FLSA—the sections specifically incorporated in § 7(b) of the ADEA—provide that in an action for unpaid minimum wages or overtime compensation only the "employer" may be held liable for a monetary award. Section 16 of the FLSA is the provision that defines the civil action for monetary relief based on a claim of unpaid minimum wages or overtime compensation that may be brought by either the affected employee or by the Secretary of Labor. Section 16(b), as codified in 29 U.S.C. § 216(b), states in pertinent part:

> Any *employer* who violates the provisions of section 206 ["Minimum Wage"] or section 207 ["Maximum hours"] of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be . . . [Emphasis added.] [2]

The FLSA defines "employer" as "not includ[ing] any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization." 29 U.S.C. § 203(d). It is therefore plain that § 16(b) does not authorize the courts to require a union to provide monetary relief for unpaid minimum wages or overtime compensation.

Section 16(c), 29 U.S.C. § 216(c), provides, in turn, that the Secretary of Labor may bring an action to recover the amounts that affected employees would be entitled to recover under § 16(b). Section 16(c) states that "[t]he Secretary is authorized to supervise the payment of unpaid minimum wages or the unpaid overtime compensation owing to any employee," and that the employee's acceptance of such payment shall constitute a waiver by the employee of his right to sue under § 16(b). Section 16(c) further provides that the Secretary may bring an action "to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages," and that an employee's right to sue under § 16(b) "shall terminate upon the filing of a complaint by the Secretary in an action under [§ 16(c)]. . . ."

As the interrelationship of the two sections makes clear, "[a] suit under § 16(c) . . . is essentially a representative action brought to enforce the private rights described

---

[2] The remainder of the quoted sentence states: "and in and additional equal amount as liquidated damages." This entitlement to liquidated damages is qualified by the affirmative defense in 29 U.S.C. § 260. The ADEA treats the issue of liquidated damages in a different fashion. Section 7(b) of the ADEA, in a proviso to the "amounts owing" sentence quoted *supra*, at 4, states "[t]hat liquidated damages shall be payable only in cases of willful violations of this chapter."

in § 16(b)." *EEOC v. Corry Jamestown Corp.*, 719 F.2d 1219, 1221 (3d Cir. 1983). See also *Wirtz v. Jones*, 340 F.2d 901, 904 (5th Cir. 1965) ("Under § 16(b) the employees may sue the employer for backpay, and under § 16(c) the Secretary . . . may bring the action"). Section § 16(c), in short, does not expand the parties who may be sued for unpaid minimum wages or overtime compensation, nor the measure of monetary relief that may be sought, beyond what is authorized by § 16(b). See S. Rep. No. 640, 81st Cong., 1st Sess. 8 (1949) (describing § 16(c) as an alternative procedure for recovering the unpaid wages that can be recovered from an employer under § 16(b)).

The same result obtains under § 17 of the FLSA. Section 17 authorizes the Secretary of Labor to bring suit for injunctive relief to restrain violations of the FLSA.[9] In 1961, Congress repealed a proviso to § 17 that prohibited a court in a suit for injunctive relief brought by the Secretary from ordering "the payment of unpaid minimum wages or unpaid overtime compensation." Pub. L. 81-393, § 15 (1949). In place of that proviso. the 1961 Congress inserted language stating that the relief available in a § 17 action may "include . . . the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter." Pub. L. 87-30, § 12(b) (1961), codified at 29 U.S.C. § 217. This language was added to give the Secretary a more efficient means, free from the various procedural requirements attendant to a § 16 action, to obtain payment of unpaid minimum wages or overtime compensation. See H.R. Rep. No. 75, 87th Cong., 1st Sess. 27-28 (1961); S. Rep. No. 145, 87th Cong., 1st Sess. 39-40 (1961). The Conference Report accompanying the legislation makes clear that this additional means to recover unpaid minimum wages or overtime compensation is, like a § 16 action, directed solely at employers:

> Under [§ 17], the Federal district courts would be authorized, in injunction actions brought by the Secretary of Labor, to issue court orders requiring *employers* to cease unlawful withholding of minimum wages and overtime compensation found by the court to be due to employees under the act. [H.R. Conf. Rep. No. 327, 8th Cong., 1st Sess. 20 (1961) (emphasis added); see also H.R. Rep. No. 75, *supra* at 37; S. Rep. No. 145, *supra* at 51.]

That the employer is the sole source for an award of monetary relief under the FLSA is not a happenstance but rather a direct expression of the point of the Act as a whole. Congress was concerned that employers who pay less than the minimum wage or less than the required amount of overtime compensation would achieve an unfair economic advantage over competitors who abide by the requirements of the law. Thus, in § 2 of the FLSA, 29 U.S.C. § 202, Congress declared,

> that the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . (3) constitutes an unfair method of competition in commerce; . . . .

Such an unfair competitive advantage can only be removed if an employer is made to bear the full responsibility for paying what was wrongfully withheld.

The need to eradicate this unfair competitive advantage has been a consistent theme as Congress has refined the remedial scheme of the FLSA over the years. In 1949, when Congress added subsection (c) to § 16 of the FLSA, for the first time authorizing the Secretary of Labor under certain circumstances to sue under § 16 for recov-

[9] As this Court recognized in *Lorillard*, "the courts [have] consistently declared that injunctive relief [under the FLSA] [is] not available in suits by private individuals but only in suits by the Secretary." 434 U.S. at 581.

ery of unpaid minimum wages,[4] the Senate Report justified that new power in part by reference to the following testimony offered by the Secretary:

> [T]he existence of such power would tend to discourage employers from failing to pay minimum wages or overtime compensation, thus nullifying the competitive advantage which is created when employees fail to take action to recover unpaid back wages. The additional power being requested would foreclose an employer from benefiting from his violation of the act when injunction action is not appropriate. [S. Rep. No. 640, 81st Cong., 1st Sess. 7 (1949).]

In 1961, when Congress amended § 17 to permit the Secretary to recover unpaid minimum wages or overtime compensation in an injunction action, see *supra at* 6, a prime objective was to provide an additional means for eradicating unfair wage competition:

> The proposed amendment would make [efforts to achieve compliance] much more effective by providing a practical method for requiring payment of the amounts of any wages or overtime compensation which an employer has failed or refused to pay, as required by the act. Placing the probability of financial liability on those employers who are presently careless of their obligations under the act would increase the level of compliance with the statute, and would protect complying employers from the unfair wage competition of the noncomplying employers. [H.R. Rep. No. 75, *supra*, at 28; S. Rep. No. 145, *supra*, at 40.]

3. Congress' "cho[ice] to incorporate the enforcement scheme of the [FLSA] into § 7 of the ADEA," *Lehman v. Nakshian*, 453 U.S. at 163, was an informed and carefully considered one. The *Lorillard* Court quoted the

[4] Until 1949, only the affected employee could bring suit under § 16. Fair Labor Standards Act of 1938, ch. 676, § 16, 52 Stat. 1069 (1938); Pub. L. No. 81-393, § 14 (1949).

statement of Senator Javits, one of the floor managers of the bill, that ". . . in fact [the ADEA] incorporates by reference, to the greatest extent possible, the [enforcement] provisions of the [FLSA]." 434 U.S. at 582. The Court emphasized too that Congress in enacting the ADEA exhibited great "selectivity . . . in incorporating provisions and in modifying certain FLSA practices. . . ." *Id.* at 582. "[I]n enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." *Id.* at 581. *"This selectivity . . . strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA."* *Id.* at 582 (emphasis added).

Congress used Title VII of the Civil Rights Act of 1964 as the model for the scheme of substantive prohibitions enacted in the ADEA. *Lorillard*, 434 U.S. at 584, 585. But Congress rejected the remedial scheme of Title VII, which provides for monetary remedies against unions, *Lorillard*, 434 U.S. at 584-585. Instead, Congress adopted, indeed incorporated, the scheme of the FLSA, which as we have shown, has a different remedial premise from that of Title VII. *Id.* at 584-585; see *supra*, at 4-8. Against this background, Congress must be understood to have adopted not only the words of the FLSA but also its remedial premise: that the employer is to bear the full monetary consequences of his wrongful conduct.

4. TWA's main argument from the language of the ADEA is that the following sentence in § 7(b) is intended to depart from this remedial premise and to provide for union liability:

> In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limi-

> tation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.[8]

But, viewed in context, this sentence cannot be understood to provide for any additional form of monetary relief, and certainly not for any new source for monetary relief. The language quoted by TWA directly follows the sentence that provides that all "amounts owing" under the ADEA "shall be deemed to be" unpaid minimum wages or overtime compensation for purposes of § 16 and § 17 of the FLSA. Consistent with that encompassing declaration, the only monetary relief described in the sentence relied upon by TWA is relief to "*enforce the liability for amounts deemed to be unpaid minimum wages or overtime compensation under this section*" (emphasis added); the relief for which the FLSA makes *employers* solely liable.[9] Based on the language of § 7(b), this Court in *Lorillard* found that "Congress must have meant the phrase 'legal relief' to refer to judgments 'enforcing . . . liability for amounts deemed to be unpaid minimum wages or overtime compensation.'" 434 U.S. at 583, n.11. And, every court of appeals that has considered the question has concluded that the only monetary relief permitted under the ADEA is that which is authorized with respect to unpaid minimum wages or overtime compensation in §§ 16 and 17 of the FLSA.[7]

---

[8] This passage is restated in § 7(c), without repetition of the examples of appropriate relief.

[9] The departure from the FLSA scheme that is effected by the sentence relied up by TWA is to authorize private parties to bring injunction actions. *See Lorillard*, 434 U.S. at 581. In addition, the sentence serves to make clear that the courts are to provide forms of available equitable relief appropriate to the types of employment actions that would likely be the subject of age discrimination suits.

[7] *See Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147-48 (2d Cir. 1984) (the provision that "amounts owing . . . shall be deemed to be unpaid minimum wages . . ." is "dispositive of the drafters' intentions," and precludes any other monetary relief); *Slatin v. Stanford Research Institute*, 590 F.2d 1292, 1295 (4th Cir. 1979) ("the broad language of [§§ 7(b) and (c)]—'The court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter'—is limited by the[] specific references to unpaid wages and overtime"); *Vasquez v. Eastern Air Lines, Inc.*, 579 F.2d 107, 109 (1st Cir. 1978) (ADEA's reference to "legal or equitable relief" is "limited by . . . the fact that amounts owing as a result of a violation are to be treated as if they were unpaid minimum wages or unpaid overtime compensation"); *Perrell v. Financeamerica Corp.*, 726 F.2d 654, 657 (10th Cir. 1984) ("every time the issue of permissible scope of damages has been addressed, each circuit court has held that the ADEA is limited to the damages specifically enumerated"—i.e., damages authorized by § 16 for unpaid minimum wages or overtime compensation); *Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684, 685-86 (7th Cir.), *cert. denied*, —— U.S. ——, 103 S.Ct. 453 (1982); *Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 809-10 (8th Cir. 1982); *Naton v. Bank of California*, 649 F.2d 691, 699 (9th Cir. 1981); *Dean v. American Security Ins. Co.*, 559 F.2d 1036, 1038 and n.6 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834, 839-40 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

TWA attempts to buttress its position by reference, at p. 41 of its brief, to passages in the legislative history indicating that Congress meant the ADEA to apply to unions as well as employers. But there is no dispute that the ADEA contains both prohibitions and remedies that apply to unions. The question here is whether Congress intended to make unions liable for monetary awards. None of the passages cited by TWA is addressed to this question. Certainly, none indicates a congressional intent to diverge from the FLSA remedial scheme that Congress chose to incorporate in the ADEA. That scheme provides that where a prohibition is equally applicable to employers and unions, only the employer is made liable for monetary relief.[8]

---

[8] It is particularly striking that in the case of a retaliation violation under § 15(a)(3) of the FLSA, 29 U.S.C. § 215(a)(3)—which may be committed by a union as well as by an employer—the FLSA expressly provides for monetary relief only against the employer:

> Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as

TWA also argues that this Court should interpret the ADEA as if it incorporates the remedial scheme of Title VII or of the National Labor Relations Act. But, as we have already shown, Congress had the option in fashioning the ADEA to adopt the remedial schemes of Title VII or the NLRA and, as this Court stated with specific reference to Title VII, "Congress rejected that course in favor of the FLSA [scheme]." *Lorillard*, 434 U.S. at 584-585. TWA asks no less than that this Court substitute a scheme that Congress rejected for one that it chose to adopt.

Finally, TWA suggests that "logic" and "policy" militate against a literal interpretation of the remedial provision of ADEA. Implicit in this suggestion is the notion that there is only one "correct" remedial scheme for a statute such as ADEA—the one that provides that where there are two or more defendants each should be held monetarily liable according "to the degree that they are each culpable." TWA Br. at 44. But, as we have already shown, the objective of the FLSA to eliminate unfair competition among employers points to a different remedial approach. And, as this Court has recognized in another context, there is legitimate room for debate whether deterrence of wrongdoing and enforcement of federal statutes is better assured where "most or all wrongdoers will be held liable and thus share the consequences of the wrongdoing" or where there is "the possibility . . . that a single participant could be held fully liable for the total amount of the judgment." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 636 (1981). Certainly, Congress is entitled to prefer the latter scheme where, as is the paradigm case under the ADEA, the commission of the wrong requires the partici-

may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. [§ 16(b), FLSA, 29 U.S.C. § 216(b).]

pation of the defendant who Congress determines is always to be held "fully liable."[9] Whatever the relative wisdom of these diverse options, the choice is for Congress to make. And, by incorporating in the ADEA the FLSA provisions governing monetary relief for unpaid minimum wages and overtime compensation, Congress chose to place monetary liability for violations of the ADEA solely upon the employer.[10]

CONCLUSION

For the foregoing reasons, if the issue of union liability for monetary relief under the ADEA is decided by this Court, the decision of the Second Circuit on this issue should be affirmed.

Respectfully submitted,

ROBERT M. WEINBERG
JEREMIAH A. COLLINS
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

[9] As one court has pointed out in the context of an Equal Pay Act case, "if employers are aware that they alone will bear the economic consequences of Equal Pay Act violations, a greater incentive would exist for resisting coercive pressures placed upon them by . . . unions." *EEOC v. Ferris State College*, 493 F. Supp. 707, 716 (W.D. Mich. 1980).

[10] If, contrary to our submission, the Court determines that unions may be held monetarily liable under the ADEA, the case should be remanded for a determination by the lower courts of the appropriate principles for deciding the relative amount of monetary liability that the employer and the union should bear. That issue has not yet been addressed by either of the courts below and should not, in the first instance, be decided by this Court.

RESPONDENT'S

BRIEF

Nos. 83-997, 83-1325

Office Supreme Court, U.S.
FILED
JUL 11 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and TRANS WORLD AIRLINES, INC.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENTS HAROLD H. THURSTON, CHRISTOPHER J. CLARK, AND C.A. PARKHILL

RAYMOND C. FAY
(Counsel of Record)
ALAN M. SERWER
SUSAN D. GOLAND
ELIZABETH H. CAMERON
HALEY, BADER & POTTS
11 S. LaSalle Street, Suite 1600
Chicago, Illinois 60603
(312) 782-7416
Attorneys for Respondents Harold H. Thurston, Christopher J. Clark, and C.A. Parkhill

July 1984

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether an airline that involuntarily retires pilots at age sixty, strips them of their seniority, and refuses to allow them to transfer to flight engineer while allowing all similarly-situated younger pilots to retain their employment, has violated the Age Discrimination in Employment Act (ADEA).

2. Whether the violations of the ADEA were willful.

3. Whether unions are liable for back pay under the ADEA.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	1
TABLE OF AUTHORITIES	iv
STATUTES AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Preliminary Factual Matters	2
B. Harold H. Thurston	7
C. Christopher J. Clark	7
D. Clifton A. Parkhill	8
E. Evidence of Willfulness in 1978	9
SUMMARY OF ARGUMENT	14
ARGUMENT	
I.	
THE CHALLENGED ACTIONS CONSTITUTE UNLAWFUL AGE DISCRIMINATION	15
A. The Mandatory Retirement Of Plaintiffs, The Severance Of Their Seniority Rights, And The Refusal To Allow Them To Transfer To Flight Engineer Were Because Of Age	15
B. The ADEA §4(f)(2) Bona Fide Seniority System Defense Is Inapplicable	20
C. The ADEA §4(f)(1) Bona Fide Occupational Qualification (BFOQ) Defense Is Inapplicable	22

II.	
THE COURT BELOW PROPERLY FOUND WILLFUL VIOLATIONS OF THE ADEA	24
A. The Test For Willfulness Under The ADEA Does Not Require Proof Of Specific Intent	25
B. The Standard Of Willfulness Is The Same Under The ADEA And FLSA, And There Is No Good Faith Exception	30
C. Alternatively, The Second Circuit Test Satisfies The Civil Intent Standard And Other ADEA Court Tests For Willfulness	31
III.	
THE ADEA AUTHORIZES RECOVERY OF MONEY DAMAGES FROM LABOR ORGANIZATIONS THAT DISCRIMINATE ON THE BASIS OF AGE	33
A. The Legislative History And Purpose Of The ADEA Favor Holding Unions Liable	34
B. The Express Language Of The Statute Authorizes Monetary Relief Against Labor Organizations	36
C. ALPA Willfully Violated The ADEA	41
CONCLUSION	43

TABLE OF AUTHORITIES

CASES	PAGE
Aero Mayflower Transit Co. v. I.C.C., 535 F.2d 997 (7th Cir. 1976)	29
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	36
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)	17
Anderson v. Savage Labs, 675 F.2d 1221 (11th Cir. 1982)	19
Aronsen v. Crown Zellerbach, 662 F.2d 584 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 1183 (1983)	35
Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981)	17
Blackwell v. Sun Electric Corp., 696 F.2d 1176 (6th Cir. 1983)	24, 33
Bowe v. Judson C. Burns, Inc., 137 F.2d 37 (3d Cir. 1943)	39
Brennan v. Emerald Renovators, Inc., 410 F.Supp. 1057 (S.D.N.Y. 1975)	37
Brennan v. Hughes Personnel, Inc., 8 Empl.Prac. Dec. [CCH] ¶9571 (W.D. Ky. 1974)	40
Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945)	29
Brown-Forman Distillers Corp. v. U.S. Treasury Dept., 591 F.2d 375 (6th Cir. 1979)	28-29
Bruce v. United States, 621 F.2d 914 (8th Cir. 1980)	28, 32
Carter v. Maloney Trucking & Storage, Inc., 631 F.2d 40 (5th Cir. 1980)	18
Carroll v. Exxon Corp., 434 F.Supp. 557 (E.D. La. 1977)	32

Chelentis v. Luckenbach Steamship Co., 247 U.S. 372 (1918)	41
Ciccone v. Textron, Inc., 616 F.2d 1216 (1st Cir.), *vacated and remanded*, 449 U.S. 914 (1980)	35
Coates v. National Cash Register Co., 433 F.Supp. 655 (W.D. Va. 1977)	20
Coke v. General Adjustment Bureau, 640 F.2d 584 (5th Cir. 1981)	35
Corning Glass Works v. Brennan, 417 U.S. 188 (1974)	21
Connecticut v. Teal, 457 U.S. 440 (1982)	20
Cova v. Coca-Cola Bottling Co., 574 F.2d 958 (8th Cir. 1978)	19
Criswell v. Western Air Lines, Inc., 709 F.2d 544 (9th Cir. 1983), *pet. for cert. filed*, 52 U.S.L.W. 3722 (U.S. April 3, 1984) (No. 83-1545)	17, 23
Crosland v. Charlotte Eye, Ear & Throat Hospital, 686 F.2d 208 (4th Cir. 1982)	32
Cuddy v. Carmen, 694 F.2d 853 (D.C. Cir. 1982)	19
Dennis v. United States, 341 U.S. 494 (1951)	26
Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981)	19
EEOC v. ALPA, 489 F. Supp. 1003 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981)	40
EEOC v. Baltimore & Ohio R.R., 632 F.2d 1107 (4th Cir. 1980), *cert. denied*, 454 U.S. 825 (1981)	21
EEOC v. Chrysler Corp., 546 F.Supp. 54 (E.D. Mich. 1982), *aff'd*, 733 F.2d 1183 (6th Cir. 1984)	38
EEOC v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982)	23
EEOC v. County of Los Angeles, 706 F.2d 1039 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 984 (1984)	23
EEOC v. County of Santa Barbara, 666 F.2d 373 (9th Cir. 1982)	21

EEOC v. Home Insurance Co., 672 F.2d 252 (2d Cir. 1982) 21
Elliott v. Group Medical & Surgical Services, 714 F.2d 556 (5th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3860 (1984) 30
Ewald v. Great Atlantic & Pacific Tea Co., 620 F.2d 1183 (6th Cir.), *vacated and remanded*, 449 U.S. 914 (1980) 35
Ferrara v. Braniff Airways, Inc., No. CA 3-80-1273-R (N.D. Tex. Sept. 30, 1983) 42
Frank Irey Jr., Inc. v. Occupational Safety and Health Review Commission, 519 F.2d 1200 (3d Cir. 1975) 26
Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) 18, 35
Gibson v. Mohawk Rubber Corp., 695 F.2d 1093 (6th Cir. 1982) 29, 30
Golomb v. Prudential Insurance Co. of America, 688 F.2d 547 (7th Cir. 1982) 19
Goodman v. Heublein, Inc., 645 F.2d 127 (2d Cir. 1981) 33
Hayes v. Republic Steel Corp., 531 F.2d 1307 (5th Cir. 1976) 30
Hedrick v. Hercules, 658 F.2d 1088 (5th Cir. 1981) 24, 30, 32
Hertz Drivurself Stations v. United States, 150 F.2d 923 (8th Cir. 1945) 27
Johnson v. American Airlines, Inc., 31 Empl.Prac. Dec. [CCH] ¶33,417 (N.D. Tex. 1983) 21
Johnson v. Mayor of Baltimore, 731 F.2d 209 (4th Cir. 1984) 23
Kalb v. United States, 505 F.2d 506 (2d Cir. 1974) . 28
Kaplan v. IATSE, 525 F.2d 1354 (9th Cir. 1975) 35
Kelly v. American Standard, Inc., 640 F.2d 974 (9th Cir. 1981) 19, 25, 31, 33

Kentroti v. Frontier Airlines, Inc., 585 F.2d 967 (10th Cir. 1978) 35
Kiehl v. Pan American World Airways, Inc., No. C-81-4274-WAI (N.D. Cal., Jan. 28, 1983) ... 3
Kolb v. Goldring, 694 F.2d 869 (1st Cir. 1982) 29
Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975) 19
Lauretex Textile Corp. v. Allton Knitting Mills, 519 F.Supp. 730 (S.D.N.Y 1981) 29, 32
Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) 18, 25, 31, 35
Longview Refining Co. v. Shore, 554 F.2d 1006 (T.E.C.A. 1977) 26
Lorillard v. Pons, 434 U.S. 575 (1978)..... ..... 27, 30-31, 34, 36, 37-38
Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978) 18
McClanahan v. Mathews, 440 F.2d 320 (6th Cir. 1971) 30
McDonald v. City of West Branch, 104 S.Ct. 1799 (1981) 17
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 17, 18, 24
Meek v. United States, 136 F.2d 679 (6th Cir. 1943) 39
Mistretta v. Sandia Corp., 639 F.2d 588 (10th Cir. 1980) 25, 32
Mohasco Corp. v. Silver, 447 U.S. 807 (1980) .. 35
Monday v. United States, 421 F.2d 1210 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970) 28
Monroe v. United Air Lines, Inc., 31 Empl. Prac. Dec. [CCH] ¶¶33,330, 33,331 and 32 Empl.Prac. Dec. [CCH] ¶33,658 (N.D. Ill. 1983), *rev'd and remanded*, Nos. 83-1245 et al. (7th Cir. May 30, 1984) 42

Morgan v. Washington Manufacturing Co., 660 F.2d 710 (6th Cir. 1981) 35
Morisette v. United States, 342 U.S. 246 (1952) 26
Nabob Oil Co. v. United States, 190 F.2d 478 (10th Cir.), *cert. denied*, 342 U.S. 876 (1951) 27
Naton v. Bank of California, 72 F.R.D. 550 (N.D. Cal. 1976), *aff'd in part, remanded in part*, 649 F.2d 691 (9th Cir. 1981) 37
Neuman v. Northwest Airlines, Inc., 29 Fair Empl. Prac.Cas. [BNA] 1488 (N.D. Ill. 1982) 40-41
Neuman v. Northwest Airlines, Inc., No. 79 C 1570 (N.D. Ill. April 5, 1983) 3, 42
Northcross v. Board of Education of Memphis City Schools, 412 U.S. 427 (1973) 35
Orzel v. City of Wauwatosa Fire Department, 697 F.2d 743 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983) 23
Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) 35, 40
Overnight Motor Transportation Co., Inc. v. Missel, 316 U.S. 572 (1942) 29
Parcinski v. Outlet Co., 673 F.2d 34 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 725 (1983) 19
Patagonia Corp. v. Board of Governors of the Federal Reserve System, 517 F.2d 803 (9th Cir. 1975) 40
Penton v. The Flying Tiger Line, Inc., No. CV-81-4419-RJK (C.D. Cal. June 20, 1984) 3, 42
Richardson v. Alaska Airlines, Inc., No. C 81-974V (W.D. Wash. Nov. 1, 1982), *appeal pending*, No. 83-4021 (9th Cir.) 3, 42
Russell v. American Tobacco Co., 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 425 U.S. 935-36 (1976) 35
Santorelli v. USAir, Inc., No. 81-1053-A (E.D. Va. Mar. 16, 1982) 3

Sexton v. Beatrice Foods, Inc., 630 F.2d 478 (7th Cir. 1980) 21
Smithers v. Bailar, 629 F.2d 892 (3d Cir. 1980) 18
Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981) 18, 19, 24-25, 30
Stone v. Western Air Lines, Inc., 544 F.Supp. 33 (C.D. Cal. 1982) 19, 21, 23, 42
Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149 (7th Cir. 1981) 24, 31, 33
Teamsters v. United States, 431 U.S. 324 (1977) 16, 18
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 18
Tuohy v. Ford Motor Co., 675 F.2d 842 (6th Cir. 1982) 23
United States v. Bishop, 412 U.S. 346 (1973) .. 28
United States v. Illinois Central Railroad Co., 303 U.S. 239 (1933) 28, 32
United States v. Murdock, 290 U.S. 389 (1933) 26, 31-32
United States v. Pompiano, 429 U.S. 10 (1976) ... 28, 32
United States v. Sirhan, 504 F.2d 818 (9th Cir. 1974) 26
United States Postal Service Board of Governors v. Aikens, 103 S.Ct. 1478 (1983) 18
Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) 35
Wehr v. Burroughs Corp., 619 F.2d 276 (3d Cir. 1980) 25, 31, 33
Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) 20
Wirtz v. Ross Packaging Co., 367 F.2d 549 (5th Cir. 1966) 29
Worley v. Continental Air Lines, Inc., No. CV-80-1110-WMB (C.D. Cal. Dec. 27, 1982), *appeal pending*, Nos. 83-3594 et al. (9th Cir.) ... 3, 42

STATUTES AND REGULATIONS — PAGE

Age Discrimination in Employment Act, 29 U.S.C §621 *et seq.*:
- Section 2(a), 29 U.S.C. §621(a) 34
- Section 2(b), 29 U.S.C. §621(b) 23, 34-35
- Section 4, 29 U.S.C. §623 38-40
- Section 4(a), 29 U.S.C. §623(a) 34
- Section 4(c), 29 U.S.C. §623(c) .. 16, 33, 34, 36, 41
- Section 4(d), 29 U.S.C. §623(d) 39, 41
- Section 4(f), 29 U.S.C. §623(f) 20-24
- Section 7, 29 U.S.C. §626 31
- Section 7(b), 29 U.S.C. §626(b) .. 25, 36, 37, 38, 41
- Section 7(c), 29 U.S.C. §626(c) 29, 36, 37

Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e *et seq.*:
- 42 U.S.C. §2000e(j) 16
- 42 U.S.C. §2000e-2(a) 34
- 42 U.S.C. §2000e-2(e) 34

Civil Rights Act of 1964, Pub. L. No. 88-352, §715, 78 Stat. 265 (1964) .. 34

Equal Pay Act, 29 U.S.C. §206(d) 37, 40-41

Fair Labor Standards Act, 29 U.S.C. §201 *et seq.*:
- Section 3(a), 29 U.S.C. §203(a) 39
- Section 6, 29 U.S.C. §206 38-40
- Section 7, 29 U.S.C. §207 38-40
- Section 15, 29 U.S.C. §215 ..... 1, 38-40
- Section 16, 29 U.S.C. §216 ..... 27, 28, 29, 38
- Section 17, 29 U.S.C. §217 38

Portal-to-Portal Act, 29 U.S.C. §251 *et seq.*:
- Section 11, 29 U.S.C. §260 30-31

14 C.F.R. §121.383(c) 6, 22

LEGISLATIVE MATERIALS

H.R. 13712, 89th Cong., 2d Sess., 112 Cong. Rec. 20819 (1966) 37

S. 830/H.R. 3651, 90th Cong., 1st Sess., 113 Cong. Rec. 2794 (1967) 25, 36, 37

S.Rep. No. 493, 95th Cong., 2d Sess. (1978) *reprinted in* 1978 U.S. Code Cong. & Ad. News 504 ..... 22, 23

S.Rep. No. 1457, 89th Cong., 2d Sess. (1966) .. 37

S.Rep. No. 723, 90th Cong., 1st Sess. (1967) .. 34, 38

H.R. Rep. No. 527, 95th Cong., 1st Sess. (1978) 23

H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967) 34, 37

Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. (1967) .. 28, 36

112 Cong. Rec. 20823 (1966) 37

113 Cong. Rec. 2199 (1967) 28

113 Cong. Rec. 7076-77 (1967) 25-26

113 Cong. Rec. 31248 (1967) 25

OTHER AUTHORITY

Secretary of Labor, *The Older American Worker: Age Discrimination In Employment* (1965) . 34

44 Fed.Reg. 37974 (1979) 37

2A C. Sands, *Sutherland Statutory Construction* (4th ed. 1973) 40

Supreme Court Rule 21.1(a) 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-997, 83-1325

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and TRANS WORLD AIRLINES, INC.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENTS HAROLD H. THURSTON, CHRISTOPHER J. CLARK, AND C.A. PARKHILL

STATUTES AND REGULATIONS INVOLVED

In addition to the statutes set forth in the brief of petitioner Trans World Airlines, Inc. (TWA) (Br. 2-5) and in the statutory appendix to the brief of respondent Equal Employment Opportunity Commission (EEOC), another statutory provision involved is Section 15(a) of the Fair Labor Standards Act of 1938 (FLSA), as amended, 29 U.S.C. §215(a), which provides in relevant part:

> After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—
>
> • • •
>
> (2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;
>
> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee; . . . .

STATEMENT OF THE CASE

Respondents Harold H. Thurston, Christopher J. Clark, and Clifton A. Parkhill (Thurston respondents) adopt the Statement contained in the brief for EEOC.

This further statement is: (a) to focus on events in 1978, the year in which the Thurston respondents and four of the EEOC claimants (Lusk, Bobsin, Gowling, and Widmayer) turned age sixty and were forced to retire; and (b) to point to facts before the courts below regarding the states of mind of respondents TWA and Air Line Pilots Association, International (ALPA) in 1978 with respect to the Age Discrimination in Employment Act (ADEA) and the issue of employment of flight engineers beyond age sixty.

The parties agreed in the court of appeals that the case was in an appropriate posture for summary judgment as to liability. 713 F.2d 940, 944 n.5, 947 (A-5 n.5, A-13).[1] The record in this case is compiled principally from business records of TWA and ALPA, and from deposition testimony taken of petitioners' principals.

A. Preliminary Factual Matters.

A number of TWA's factual characterizations must be viewed in light of the undisputed facts:

[1] "A__" refers to the decisions below which are reprinted in the appendix to TWA's December 16, 1983 petition for certiorari. "J.A. __" refers to the Joint Appendix filed in the Second Circuit which the parties may cite by permission of this Court (52 U.S.L.W. 3697). "R. __" refers to the numbered entries on the district court clerk's docket, reproduced in the Joint Appendix (J.A. 9-20).

1. *83% "success" rate.* TWA states "83% of those Captains seeking to serve beyond age 60 have succeeded in that regard" (Br. 10). A company review at the end of 1978 shows (R. 96, Ex. 1; R. 175, Ex. 22):

> Pilots retired at age sixty between April 6, 1978 and December 31, 1978—40
>
> Number of pilots who have expressed a desire to fly as flight engineers after age sixty—17
>
> Number of pilots who have been awarded a flight engineer bid and are flying as flight engineers—zero.

TWA did not employ age sixty Captains in the flight engineer position in 1978. The first two successful Captain bidders did not enter flight engineer training until the spring of 1979 after they reached age sixty (J.A. 675; R. 168, pp. 148-49).

2. *"Only trunk airline."* The fostered implication of TWA's carefully worded statement (Br. 29 and n.37)[2] is that it did not react to ongoing legal proceedings in changing its mandatory retirement policy. Prior to August 1978, TWA was in litigation on the issue in various administrative forums. Respondent Thurston had filed age dis-

[2] Almost all major carriers employ or have agreed to employ flight engineers beyond age sixty: Alaska, American, Braniff, Capitol, Continental, Federal Express, Flying Tiger, Northwest, Pan American, TWA, United, USAir, and Western. TWA is aware that there are around 500 flight engineers over age sixty on these carriers. The fact that at least six airlines have agreed to enter into consent decrees providing for the employment of former Captains as flight engineers beyond age sixty does not make their action any less "voluntary" than TWA's: *Worley v. Continental Air Lines, Inc.*, No. CV-80-1110-WMB(Kx) (C.D. Cal., consent decree entered December 27, 1982); *Kiehl v. Pan American World Airways, Inc.*, No. C-81-4274-WAI (N.D. Cal., consent decree entered Jan. 28, 1983); *Santorelli v. USAir, Inc.*, No. 81-1053-A (E.D. Va., consent decree entered Mar. 16, 1982); *Richardson v. Alaska Airlines, Inc.*, No. C-81-974V (W.D. Wash., consent decree entered Nov. 1, 1982); *Neuman v. Northwest Airlines, Inc.*, No. 79 C 1570 (N.D. Ill., consent decree entered April 5, 1983); *Penton v. The Flying Tiger Line, Inc.*, No. CV-81-4419-RJK (C.D. Cal.) (consent decree entered June 20, 1984).

crimination complaints with the U.S. Department of Labor and the State of California (R. 169, Exs. 7, 10). David J. Crombie, TWA's Senior Vice President of Administration, saw the Department of Labor complaint of another TWA crewmember as "a factor" in TWA's treatment of the issue, along with (J.A. 655):

> • The necessity to deal with this whole problem in a manner designed not to scar the relationship we have with ALPA.
>
> • The necessity to comply with the law expeditiously so that we do not build up a substantial back pay obligation.

3. *Bidding as the "basic mechanism."* TWA's fact statement (Br. 9-10) omits mention of displacements, the other principal mechanism of pilot movement under the contract. Section 19 of the pilot contract is entitled "Vacancies and Displacements," and Section 19(C)(1), which TWA partially quotes, requires TWA to "publish bulletins announcing vacancies, displacements, and assignment of pilots resulting from such vacancies and displacements" (J.A. 304).[3] These bulletins are referred to collectively as "bid messages" (R. 168, p. 123). Bidding for vacancies occurs with an increase in flying time or manpower requirements; displacements occur with a decrease (*compare* §19(D)(1)(a) *with* §19(G)(1)(b); J.A. 304, 311). Pilot movement resulting from vacancies and displacements is "simultaneously effected" (§19(A)(1), §19(D)(1)(b); J.A. 302, 305). As with vacancies, displacement preferences are granted on a seniority basis (§19(A)(2), J.A. 305; §17, J.A. 294). A pilot may use his seniority to displace a less senior

[3] The Thurston respondents were retired while the 1977 Working Agreement (J.A. 353) was in force. A larger portion of the 1979 Working Agreement is reproduced in the Joint Appendix (J.A. 250). Changes from the 1977 agreement are indicated by black lines in the margin (*see* J.A. 252).

pilot in any status at his current or last former domicile (A-11; §19(G), J.A. 311).

Between the April effective date of the 1978 ADEA Amendments and September 1, 1978, there were no flight engineer vacancies announced (A-10; R. 175, Ex. 16; J.A. 1020), although numerous displacements of pilots occurred (*see, e.g.*, R. 169, Ex. 5).

4. *"Minute" downgrading of pilots.* The court of appeals outlined various types of movement among younger pilots which result in a downgrade rather than the pilot losing his or her job (A-10 to A-11). Although there is no dispute that these practices occur under contractual and extra-contractual mechanisms, TWA now focuses on quantity, saying that the absolute numbers are "minute."

The court of appeals did not elaborate on the number of pilots who have bid or displaced to lower positions pursuant to posted bid messages, as it was undisputed that this practice occurred regularly. Instead, the court focused on situations where pilots under age sixty, dislodged from their former positions because of medical or other disqualifications, did not lose their employment totally. TWA's manpower planning head, Joseph Bryner, testified about these occurrences:

> **Disciplinary downgrades:** "many instances" (J.A. 972); "Many times, over many years" (J.A. 1025). Disciplinary downgrading is not addressed in the contract (R. 168, p. 146).
>
> **Medical downgrades,** §19(A)(3)-(4): two pilots are currently working as flight engineers under this practice, which first went in effect around 10 years ago (J.A. 968-70).
>
> **Student Captain or copilot failure to qualify,** §6(B)(16): 20 permanent flight engineers (J.A. 946-47; J.A. 634).

Failure to requalify in pilot position, §6(B)(17): 10 to 12 in the past 3 to 5 years (J.A. 947-48, 997; J.A. 634).

5. *Flight engineer "status."* The August 10, 1978 bulletin issued by TWA states that "any cockpit crew member who is in a flight engineer status at age 60 may not be compelled to retire" (J.A. 425). The term "flight engineer status" was not defined (A-9).

"Flight engineer status" as used in the bulletin meant different things for different crewmembers. TWA interpreted it to include active and retired flight engineers as well as active and retired International Relief Officers (IROs) (J.A. 587). For Captains and First Officers, TWA interpreted the bulletin to mean that they had to bid on and be awarded a flight engineer vacancy with an "effective date" prior to the sixtieth birthday (A-9). This excluded retired Captains and First Officers (A-10).

The term "flight engineer status" as used in the August 1978 bulletin was for "purposes of policy," as distinguished from "status" under the pilot contract (R. 98, p. 368; *see id.* at 274, 370). IROs, for example, are in a contractual status separate from flight engineers (J.A. 1012-13; R. 98, pp. 270-74; R. 167, pp. 87-88; §33(F), J.A. 339-40). Except at age sixty when TWA drops them to flight engineer for policy purposes (J.A. 971), IROs must "bid like everyone else" if they want to become flight engineers (R. 98, p. 274). IROs, like other pilots, are subject to the FAA's "Age 60 Rule," 14 C.F.R. §121.383(c) (J.A. 1026; R. 98, p. 371).

Similarly, some Captains who have remained employed beyond age sixty have not actually become flight engineers until well after age sixty. For contractual and pay purposes, they remain in the "actual status of captain" with the "assigned status of flight engineer" (J.A.

989). Until 1980, TWA regularly scheduled flight engineer training to begin after the Captain's sixtieth birthday and after the "effective date" of the bid (J.A. 675). One TWA Captain turned age sixty in November 1979 but was not scheduled to begin flight engineer training until March 1980 (J.A. 988; J.A. 765, line 10).

B. Harold H. Thurston.

Respondent Thurston turned age sixty on June 11, 1978. His request to work beyond age sixty (J.A. 909) was denied not for lack of flight engineer vacancies, but solely because of age. The May 26, 1978 response to his request from J.E. Frankum, TWA's Vice President of Flight Operations, stated (J.A. 647):[4]

> As you are aware, TWA's agreement with ALPA, which applies to you, as well as the retirement program established thereunder, provides that retirement is required upon reaching one's 60th birthday. Accordingly you will be duly retired on that date.

There were no considerations requiring Thurston's retirement other than the mandatory retirement age stated in the letter (R. 98, p. 320). Prior to this date, however, TWA had already recognized that the "new age 70 law destroys our defense for such retirement" (R. 165, *ALPA* Hilly Ex. 1).

C. Christopher J. Clark.

On July 19, 1978, respondent Clark wrote TWA to request to continue his employment beyond age sixty. By letter dated August 3, 1978, Joseph C. Hilly, TWA's Vice President of Labor Relations, wrote Clark to inform him

[4] EEOC claimant Bobzin, who turned sixty on May 9, 1978, received a similar response (J.A. 643-44).

that TWA had not yet finalized its age sixty flight engineer employment practices. Mr. Hilly stated (J.A. 648):

> Accordingly, for the time being at least, you will not be permitted to work as a flight engineer after you become sixty years of age. I want to assure you, however, that should our policies ultimately be such that they would have permitted you to continue to work after attaining age sixty, you will be reinstated effective on your sixtieth birthday, with the pay and benefits then applicable to flight engineers who continue to work after age sixty.

Mr. Clark relied upon Mr. Hilly's letter and understood it to mean he did not have to place a flight engineer bid (J.A. 922-24, 928). Despite TWA's assurance, Clark was required to retire on September 19, 1978.[8]

D. Clifton A. Parkhill.

Respondent Parkhill's sixtieth birthday was August 22, 1978. Prior to his sixtieth birthday, he bid the flight engineer vacancies with the "effective date" of September 1, 1978 (J.A. 916-17). His bid was denied and he was required to retire.[8]

The flight engineer awards effective September 1, 1978 were announced on August 30, 1978 (J.A. 471). Normally TWA posts vacancies months ahead of the effective date (R. 168, pp. 15, 139-40).

[8] Respondent Clark contacted his chief pilot three times following TWA's August 10 announcement to inquire about his status. He was told that it was being handled out of TWA corporate headquarters and "I can't touch it with a ten-foot pole" (J.A. 923-28; *see* R. 96, pp. 86-87).

[8] Similarly, EEOC claimant Gowling, who turned sixty on August 27, 1978, had his flight engineer bid denied (J.A. 882).

TWA has the discretion to advance or defer the effective date of a bid (J.A. 932). There is no contractual timetable for getting a crewmember trained to fulfill his bid (J.A. 933). At times TWA defers training because of personal hardship problems (J.A. 936).

E. Evidence of Willfulness in 1978.

The Statement in the brief for EEOC discusses TWA's short-lived July 1978 policy decision to comply fully with the ADEA and reemploy former Captains, such as respondent Thurston, without requiring a flight engineer bid (J.A. 426-27). Captain J.E. Frankum, TWA's Vice President of Flight Operations, "disavowed" that decision (J.A. 1006A). The "conscious decision" not to reinstate Thurston and other Captains who had been mandatorily retired (R. 98, pp. 253-54) was followed by TWA's implementation of its August 10, 1978 bulletin (J.A. 425) in a manner which resulted in the mandatory retirement of respondents Clark and Parkhill and the remaining EEOC claimants (A-9 to A-12).

Other evidence before the courts below bears on the issue of willfulness. Over two months before Mr. Crombie's July 19, 1978 letter to ALPA stating TWA's views that the ADEA required the employment of pilots and flight engineers in the flight engineer position beyond age sixty, Mr. Crombie predicted that Captain Frankum would be "unhappy and difficult as to some of the implications of this new law,"[9] and would have to be persuaded that "probably we have no legal defense to continue to force flight engineers off the airplane before age 70" (R. 165, *ALPA* Hilly dep., Ex. 1).

[9] Captain Frankum agreed that this was an accurate statement of his position (J.A. 809).

During the summer of 1978, Captain Frankum had discussions with TWA's outside counsel on the question of whether the ADEA required TWA to permit flight engineers to fly past age sixty. Frankum "didn't think a hell of a lot of" counsel's opinion (R. 97, p. 113), and told Mr. Crombie that "him and his lawyers were full of it" (*id.* at 158).[8]

Captain Frankum acknowledged that Mr. Crombie was the "prime mover" on the age sixty question and was representing TWA's corporate position when he wrote the July 19, 1978 letter to ALPA (*id.* at 156-57; J.A. 1003-04). As to the letter itself, Captain Frankum said (J.A. 1005):

> This letter was not written by Mr. Crombie. He signed it, but the letter and these options discussed here and this discussion of this whole damn thing was done by an attorney. I already told you before the attorney was ill-advised, misinformed and didn't know what the hell he was talking about.

"The attorney was wrong," Captain Frankum stated (R. 97, p. 198).[9]

By the time Captain Frankum took over responsibility on the age sixty ADEA issue when Mr. Crombie was hospitalized in early August 1978 (J.A. 1005A), there had

[8] Counsel agreed that, in addition to changes under Fed.R.Civ.P. 30(e), certain expletives would be deleted from Captain Frankum's deposition and would not be read in open court. The edited testimony is reflected here.

[9] Captain Frankum "didn't like their [outside counsel's] interpretation of the law because I hoped it would be different" (R. 97, p. 115). He asked a TWA staff member who had just graduated from law school to look at outside counsel's interpretation "specifically with the interest of continuing retirement at age 60 for all status of flight crew members. He was particularly interested in precluding flight engineers working beyond age 60 and asked me to review the ADEA and see what my opinion was." (J.A. 832; *see* R. 167, p. 22).

been numerous meetings among TWA upper management on the subject. Counsel was present at a number of these meetings.[10] TWA representatives met with ALPA representatives as well, and counsel for one or both sides participated at times.[11] At a meeting in July attended by Frankum, Crombie, Hilly and outside counsel for both TWA and ALPA, there was "a lot of legal sparring around" concerning "what the law meant and what the law said" (R. 97, p. 204).

ALPA actively campaigned to persuade TWA to retain its age sixty mandatory retirement policy for all flight deck crew positions, and opposed TWA's action in August 1978 to attempt partial compliance with the ADEA (A-32). At first, ALPA appeared to accept the company's initial determination to comply fully with the amended law. On June 21, 1978, Jack Donlan, the Chairman of the ALPA Master Executive Council on TWA (MEC) issued a telex to MEC members (J.A. 1040):

> TWA is tentatively planning imminent announcement of plans to retain pilots and flight engineers in active employment after age 60, with duty as flight engineer. Also, pilots and flight engineers who have retired since April 6, 1978, will be offered opportunity to return as flight engineer. Captains and First Officers desiring training as flight engineer will be so qualified.
>
> The above is in accordance with the "Age Discrimination in Employment Act" which became effective April 6, 1978, and with our Working Agreement.

Shortly afterwards the MEC met, and heard from Mr. Crombie about TWA's plans to change its mandatory re-

[10] R. 97, pp. 113, 152-59; R. 167, pp. 11-13, 15, 24-27.

[11] R. 97, pp. 196, 202-05; J.A. 1033-55; R. 165, *ALPA* Hilly Exs. 2, 7; R. 165, *Thurston* Hilly Ex. 3 at 3.

tirement policy (R. 97, p. 205). Thereafter, upon advice of outside counsel, the MEC resolved to file a lawsuit to prevent TWA from allowing anyone to work on the flight deck beyond age sixty before bargaining with ALPA, and to seek a declaratory judgment under the ADEA that TWA was not obligated to employ flight engineers beyond age sixty (R. 102, pp. 276-77 and Ex. 38; *see id.*, Exs. 37, 47).[12] Upon advice of outside counsel ALPA took the position that the 1978 ADEA Amendments were not in effect, and that until such later time as they became effective, the pilot contract did not allow anyone to work beyond the mandatory retirement age of sixty (R. 102, pp. 253-54; *see id.* at 231-38, 243-52, 257-60 and Exs. 32, 34, 35).

After ALPA filed its lawsuit, it submitted to TWA contract proposals regarding the employment of crewmembers beyond age sixty (R. 102, Ex. 36; *see* J.A. 58, 64-65 ¶30; J.A. 84, 87 ¶30). The proposed changes included, among others:

> §2(G), (H). Segregation and classification into a separate job category all flight engineers over age sixty, with flight engineers under age sixty given the new title "Second Officer."
>
> §17(A)(3). Provision for a separate seniority list for age sixty flight engineers, who would be furloughed before pilots under age sixty, and in reverse order so that the most senior would be furloughed first. Upon recall, all pilots under age sixty would be recalled in regular seniority order, and then age sixty flight engineers would be recalled, with the most senior recalled last.
>
> §23(B). Mandatory retirement for those who are not, or do not revert to, flight engineer before age sixty.
>
> §23(G), §24(C). Elimination of disability retirement income and insurance coverage for those disabled during employment beyond age sixty.

Prior to the 1978 ADEA Amendments, ALPA had always opposed mandatory retirement rules based on chronological age (R. 101, Ex. 18). Right after the amendments, ALPA policy shifted to oppose age sixty downbidding to flight engineer (R. 102, Ex. 49). By November 1980, the ALPA Board of Directors formally endorsed age sixty mandatory retirement for all flight deck crewmembers, ordered "affirmative steps required to confirm such retirement age," and rescinded all prior policy opposing mandatory retirement (R. 115, Exs. 3-5).[13]

[12] That lawsuit was eventually filed on August 10, 1978, the same day TWA announced it would employ age sixty flight engineers. *Air Line Pilots Association, International* v. *Trans World Airlines, Inc.*, No. 78 Civ. 3707 (S.D.N.Y.) (J.A. 108). Summary judgment was granted against ALPA by the district court (A-50 to A-54) and the Second Circuit unanimously affirmed (A-13 to A-21). The Second Circuit held that there was no jurisdiction to entertain ALPA's ADEA declaratory judgment action as an "attempt to use the Act to cut off the rights of its older members" (A-21). ALPA did not petition for certiorari with respect to the outcome in its own lawsuit.

[13] The court of appeals noted ALPA's admission that it was motivated to oppose employment of its older members based on economic considerations in favor of younger members (A-17 n.11). The concern for economic impact on furloughees was stated by ALPA's president (R. 102, pp. 290-91), who also testified that ALPA had made no safety determination that age sixty was a BFOQ for cockpit service (R. 100, pp. 30-32). He was concerned that raising the age limit might bring on more stringent medical and proficiency monitoring requirements, which he felt would be like "pointing a gun at the heads" of airline pilots (*id.* at 43-46).

SUMMARY OF ARGUMENT

The Second Circuit found, on undisputed facts, that TWA had discriminated against the Thurston respondents and EEOC claimants solely on the basis of age. TWA mandatorily retired these senior crewmembers at age sixty, severed their seniority rights, and refused to allow them to transfer to the flight engineer position. In contrast, TWA permits all younger pilots disqualified from their positions for any reason to retain their employment and exercise their seniority rights. This direct evidence of discriminatory treatment based solely on age was unrebutted by legitimate nondiscriminatory reasons, and was not justified by either the bona fide seniority system (29 U.S.C. §623(f)(2)) or the bona fide occupational qualification (29 U.S.C. §623(f)(1)) exceptions to the ADEA.

The court below properly found willful violations of the ADEA. The legislative history and purposes of the ADEA demonstrate that Congress did not intend to impose the specific intent standard derived from criminal law as a prerequisite to finding willfulness under the ADEA. Moreover, courts have not interpreted willfulness under other civil statutes as requiring proof of specific intent. The correct standard is the willfulness standard utilized in FLSA cases, which requires a showing that the defendant knew or should have known its actions were governed by the ADEA. Alternatively, the Second Circuit test satisfies the civil intent standard and other ADEA court tests for willfulness.

The policies and purposes of the ADEA favor a holding that labor organizations are subject to liability for age discrimination on the same terms as employers. Furthermore, the express language of the ADEA provides for this result. All violations of ADEA Section 4 are violations of FLSA Section 15, which applies to "any person," including a union. Since ALPA has violated the ADEA, it is liable to the individual respondents for all statutory relief, including money damages.

ARGUMENT

I.

THE CHALLENGED ACTIONS CONSTITUTE UNLAWFUL AGE DISCRIMINATION.

A. The Mandatory Retirement of Plaintiffs, the Severance of Their Seniority Rights, and the Refusal to Allow Them to Transfer to Flight Engineer Were Because of Age.

It is undisputed that TWA retired the Thurston respondents and EEOC claimants at age sixty, severed their seniority rights, and refused to allow them to transfer to the flight engineer position (A-10 to A-12). It is undisputed that younger employees who are disqualified from their pilot (Captain or First Officer) jobs for medical, proficiency or economic reasons are not required to forfeit their seniority rights or lose their employment entirely (A-10 to A-11). It is undisputed that, in contrast to the treatment accorded Thurston and his colleagues, TWA grants the downgrading requests of all younger pilots with sufficient seniority (A-24).[14] Based on the undisputed facts, the court concluded that the "sole reason for [TWA's] discrimination against age-60 captains and first officers is their age; this is prohibited by the ADEA" (A-31).

[14] TWA states that "in any seniority system, not everyone gets what he or she wants" (Br. 35). Notwithstanding this truism, TWA does not dispute the court of appeals' finding that all younger pilots with sufficient seniority are permitted to downgrade.

TWA challenges the court of appeals decision by misstating the holding. The court did not hold that " 'because TWA routinely accommodates other employees . . . for non-age reasons,' it must 'accord the same treatment to age-60 captains and first officers.' " (Br. 16-17). In full context, the court's summary of its previous nine-page (A-22 to A-30) discussion of the merits of the case reads (A-31, footnote omitted):

> In short, because TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers, the *Thurston* litigants and the EEOC claimants must prevail on their ADEA claim. The sole reason for its discrimination against age-60 captains and first officers is their age; this is prohibited by the ADEA.

The court's holding proceeds from its analysis, on undisputed facts, that: (1) there was direct evidence of a differentiation based solely on age (A-24) and a conscious refusal on the part of TWA to retrain or relocate age sixty pilots solely because of age (A-30), which deprived respondents of employment and employment opportunities in violation of the ADEA (A-29); and (2) the statutory defenses asserted were legally insufficient to justify the discrimination (A-25 to A-29).

TWA twists the court's holding by seizing on the word "accommodates." This is a case about discrimination, not accommodation, *cf.* 42 U.S.C. §2000e(j). The court of appeals correctly defined the issue in a discriminatory treatment case such as this: whether an employer treats some people less favorably than others because of age (A-22 to A-23). 29 U.S.C. §623(a); *see* 29 U.S.C. §623(f); *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). The actions challenged here were mandatory retirement, severance of seniority rights and refusal to transfer because of age. It was those acts which the court held to be violations of the ADEA. What TWA does to "accommodate" younger pilots disqualified from their jobs formed part of the unrebutted evidence of discriminatory treatment, *i.e.*, less favorable treatment because of age. Contrary to TWA's argument, the court did not create a "new right" of accommodation based on age[15] or expand an employer's ADEA obligations to require more than equal, nondiscriminatory treatment (A-29 to A-30). Instead, the court found specific violations based on well-established ADEA principles, and entered judgment accordingly.[16]

TWA attempts to escape the ultimate finding of discrimination by reverting to the district court's lockstep adherence to the *prima facie* case formulation in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). By addressing TWA's proffered reasons for its actions and finding them not to be "legitimate, nondiscriminatory rea-

---

[15] TWA is incorrect in arguing that respondents received the same "accommodations" as younger crewmembers (Br. 17). At age sixty they were stripped of their seniority and lost all opportunity to exercise contractual entitlements, whether it be to bid on a flight engineer vacancy or to downgrade to flight engineer in the event of a medical disqualification.

[16] TWA alludes to general injunctive relief which may be sought by the EEOC at some later stage in the proceedings (Br. 20). The court did not rule on this request. TWA further attempts to stretch the court's holding with an out of context quotation from respondent Thurston's arbitration (Br. 20 n.22). There Thurston was pursuing his contractual rights under a grievance procedure, rights which are wholly apart from his ADEA rights. The arbitrator was not concerned with whether there was discrimination based on age in forcing Thurston to retire and in denying the downbid request, and the arbitration board expressly "render[ed] no opinion with respect to any legal rights that Captain Thurston might have under the ADEA" (J.A. 530). *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *McDonald v. City of West Branch*, 104 S.Ct. 1799 (1984); *see Criswell v. Western Air Lines, Inc.*, 709 F.2d 544, 547-49 (9th Cir. 1983), *pet. for cert. filed*, 52 U.S.L.W. 3722 (U.S. April 3, 1984) (No. 83-1545).

son[s]," *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981), the court of appeals correctly transcended the *prima facie* case stage of *McDonnell Douglas*. This Court has stated that the *McDonnell Douglas* formulation should not be used to "evade[ ] the ultimate question of discrimination *vel non*." *United States Postal Service Board of Governors v. Aikens*, 103 S.Ct. 1478, 1481 (1983). As the case was in a summary judgment posture (A-5 n.5), the court of appeals appropriately proceeded directly to the specific inquiry of "whether the defendant intentionally discriminated against the plaintiff." *Id.* at 1482, *quoting Burdine*, 450 U.S. at 253.[17]

The court of appeals framed the discrimination issue in the same manner as this Court has framed it in related contexts: whether the employer treats "some people less favorably than others" because of their membership in the protected class (A-22 to A-23). *Aikens*, 103 S.Ct. at 1482, *quoting Teamsters*, 431 U.S. at 335 n.15. The test is whether, but for respondents' age, their treatment would have been different. *See Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (sex discrimination). Under the ADEA, the courts of appeals almost universally have applied the "but for" test to mean that age must be a determining factor, *i.e.*, one that made a difference in the employment decision at issue.[18] Here the court found that age was not only "a

[17] Whereas this Court in *Aikens* was confronted with a full record on disputed facts, the principle is the same where the case is ripe for summary judgment. In either instance, the "court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff.'" 103 S.Ct. at 1482.

[18] *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979); *Geller v. Markham*, 635 F.2d 1027, 1035 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); *Smithers v. Bailar*, 629 F.2d 892, 896-97 (3d Cir. 1980); *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1112 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981); *Carter v. Maloney Trucking &*

(Footnote continued on following page)

determining factor," but was the sole reason for TWA's actions (A-31).[19]

The court below correctly rejected a number of TWA's arguments repeated here. First, respondents were not barred by the *McDonnell Douglas* formulation from making out a *prima facie* case by the alternative method of adducing direct proof of age discrimination (A-22 to A-24). *See Spagnuolo*, 641 F.2d at 1113; *Douglas v. Anderson*, 656 F.2d 528, 531 (9th Cir. 1981); *Stone v. Western Air Lines, Inc.*, 544 F.2d 33, 36-37 (C.D. Cal. 1982). TWA's attempt to confine the inquiry to whether there was a flight engineer "vacancy" begs the ultimate issue of discrimination in this case, where downward movement to flight engineer among younger pilots occurred by contractual mechanisms other than bid vacancies and, in some instances, without authority in the contract at all (pp. 5-6, *supra*).[20] Second, the fact that some age sixty Captains have successfully downbid to flight engineer does not justify the discrimination against respondents (A-25).

[18] *continued*
Storage, Inc., 631 F.2d 40, 42 (5th Cir. 1980); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975); *Golomb v. Prudential Insurance Co. of America*, 688 F.2d 547, 550-51 (7th Cir. 1982); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (8th Cir. 1978); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 984-85 (9th Cir. 1981); *Anderson v. Savage Labs.*, 675 F.2d 1221, 1224 (11th Cir. 1982); *Cuddy v. Carmen*, 694 F.2d 853, 856-57 (D.C. Cir. 1982).

[19] Under the "age as a determining factor" test, an ADEA plaintiff is not required to prove that age was the exclusive reason for the employment decision. *Parcinski v. Outlet Co.*, 673 F.2d 34, 36 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 725 (1983); *Golomb*, 688 F.2d at 551-52.

[20] TWA now says that such downgrading by younger pilots is "minute." The undisputed facts show otherwise, especially with regard to displacements which occur in the absence of vacancies (pp. 4-5, *supra*). Moreover, the absolute number of younger pilots who have utilized the specialized provisions to downgrade to flight engineer rather than lose their jobs entirely is irrelevant. The fact that TWA and ALPA have institutionalized the procedures means that they are available for all who need them, except for age sixty Captains and First Officers.

Connecticut v. Teal, 457 U.S. 440, 455 (1982). Besides, TWA did not allow any age sixty Captain to work as a flight engineer until 1979, after the Thurston respondents and the majority of the remaining EEOC claimants had turned age sixty.[21] Third, the finding of liability here does not afford respondents "special treatment" or "special working conditions." The court cited the same ADEA principles referred to by TWA here and found (A-29 to A-30): "Appellants do not ask for 'special treatment,' *Pucinski*, [673 F.2d at 37]; rather they merely seek the same treatment accorded all younger captains and first officers who become unable to serve in their former capacities for non-age reasons. There is nothing 'special' or 'preferential' about equal treatment." The court also pointed out that TWA's "conscious refusal" to transfer age sixty Captains and First Officers violated the ADEA's ban on equal treatment (A-30). *Williams v. General Motors Corp.*, 656 F.2d 120, 129-30 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Coates v. National Cash Register Co.*, 433 F.Supp. 655, 661 (W.D. Va. 1977).

B. The ADEA §4(f)(2) Bona Fide Seniority System Defense Is Inapplicable.

TWA argues that its actions are justified by the "bona fide seniority system" exception in ADEA Section 4(f)(2), 29 U.S.C. §623(f)(2). Although this was one of TWA's principal statutory defenses rejected by the court of appeals, it was absent from the petition for certiorari. If it is to be considered, *cf.* Supreme Court R. 21.1(a), it should be rejected for the reasons stated by the court of appeals (A-25 to A-26):

> TWA asserts that its contested practices are part of a bona fide seniority system and thus liability is foreclosed under 29 U.S.C. §623(f)(2). Appellants, however, do not challenge the operation of the seniority system, but their summary exclusion from it at age 60. The employment practice at issue in this lawsuit—the severing of age 60 captains from the company—is in no way mandated by the negotiated seniority system. That system provides only that seniority rights shall be forfeited upon severance from the company, but it does not, and lawfully cannot, specify that pilots who attain age 60 shall be severed. See *id.* §623(f)(2) (no bona fide seniority system "shall require or permit the involuntary retirement of any individual . . . [protected under the Act] because of the age of such individual"). TWA's practice, "which equates involuntary retirement as a captain at age 60 with a complete severance from the company," *Stone v. Western*, *supra*, 544 F.Supp. at 37, is not part of a bona fide seniority system. The bona fide seniority defense is therefore unavailable to TWA as a matter of law. *See Johnson v. American Airlines, Inc.*, [31 Empl.Prac.Dec. (CCH) ¶33,417 (N.D. Tex. 1983)].

The bona fide seniority system defense may not be invoked as a "legitimate, nondiscriminatory reason" under the *McDonnell Douglas v. Green* formulation (TWA Br. 25-28). Where it is available, it is an affirmative defense which places the burden of proof on the employer to prove that its actions come within the narrow exception. *See Sexton v. Beatrice Foods Co.*, 630 F.2d 478, 483-88 (7th Cir. 1980); *EEOC v. County of Santa Barbara*, 666 F.2d 373, 375, 377-78 (9th Cir. 1982); *EEOC v. Home Insurance Co.*, 672 F.2d 252, 257 (2d Cir. 1982); *EEOC v. Baltimore & Ohio R.R.*, 622 F.2d 1107, 1110-11 (4th Cir. 1980), *cert. denied*, 454 U.S. 825 (1981); *cf. Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974) (Equal Pay Act defenses, including seniority system defense, are affirmative defenses). Here TWA's actions are expressly age-based. At age sixty, a Captain or First Officer "goes off the

---

[21] In 1978, the year in which the Thurston respondents turned age sixty, TWA's "success rate" was zero (p. 3, *supra*).

seniority list" (J.A. 974) and is required to retire.[22] As age is the sole determinant in these actions, they cannot be justified as "nondiscriminatory" reasons or as reasonable factors "other than age" (A-26 n.15).[23]

C. The ADEA §4(f)(1) Bona Fide Occupational Qualification (BFOQ) Defense Is Inapplicable.

ALPA and TWA contend that because crewmembers may not serve as Captains or First Officers beyond age 60 under the FAA's Age 60 Rule, they may be lawfully retired and precluded from serving as flight engineers under the bona fide occupational qualification (BFOQ) exception to the ADEA, 29 U.S.C. §623(f)(1). The Second Circuit properly rejected this argument, noting that "it would create an exception that would swallow the Act" (A-29). The court stated (A-28):

> ALPA's argument is unpersuasive. The terms of §623(f)(1) plainly reveal its purpose, which is to excuse only those age-based actions against employees that are related to the "particular job" (in this case captain or first officer). The Senate Report makes this clear. S. Rep. No. 493, 95th Cong., 2d Sess., 10-11, *reprinted in* 1978 U.S. Code Cong. & Ad. News 513-14.

[22] In arguing that the Section 4(f)(2) seniority system defense is applicable, TWA attempts to circumvent the flat ban on mandatory retirement in that provision by contending that the FAA's Age 60 Rule, not TWA, forced respondents to retire. The FAA was not involved in TWA's retirement of respondents (A-10; J.A. 647). The FAA rule by its terms speaks only to cockpit "services" as Captain, First Officer or IRO, and does not govern service as flight engineer or employment relations as such (J.A. 543-47, 969-71). TWA's argument is defeated by its own practices from 1978 to 1986, when it employed some age sixty pilots who were still in a "status" (though not actively working in that status) subject to the Age 60 Rule (pp. 6-7, *supra*).

[23] Even if TWA's actions were considered as "reasonable factors other than age" under 29 U.S.C. §623(f)(1), they would still fail the "age as a determining factor" test (pp. 18-19, *supra*).

See also H.R. Rep. No. 527, [95th Cong., 1st Sess.] at 12.

> That age less than 60 is a BFOQ for the particular job of captain or first officer provides no license for TWA to discriminate against those over 60 who wish to transfer to positions as flight engineers, for which age 60 is not a BFOQ, by permitting other captains and first officers to do so. To hold otherwise would frustrate the purpose of the ADEA, which is "to promote employment of older persons" and "to prohibit arbitrary age discrimination in employment," 29 U.S.C. §621(b), and the purpose of the 1978 amendments, which is "to protect older workers from involuntary retirement, . . . to insure that older individuals who desire to work will not be denied employment opportunities solely on the basis of age." S. Rep. No. 493, *supra*, at 1, *reprinted in* 1978 U.S. Code Cong. & Ad. News 504; *see also* H.R. Rep. No. 527, *supra*, at 1, 2.

This holding is consistent with the construction of the BFOQ exception in other ADEA cases, including those in which the employer has attempted to utilize the FAA's Age 60 Rule to support a BFOQ for positions not covered by the rule. *Criswell*, 709 F.2d at 551 (flight engineer); *Stone*, 544 F.Supp. at 37-38 (same); *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 845 (6th Cir. 1982) (corporate pilot); *EEOC v. City of St. Paul*, 671 F.2d 1162, 1165-66 (8th Cir. 1982) (fire chief); *Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743, 749 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983) (municipal firefighter); *see EEOC v. County of Los Angeles*, 706 F.2d 1039, 1041-42 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 984 (1984) (hiring age for helicopter pilots); *contra, Johnson v. Mayor of Baltimore*, 731 F.2d 209 (4th Cir. 1984).

The court of appeals dismissed ALPA's lawsuit which was brought to establish age sixty as a BFOQ for flight engineers (A-16 to A-21). Petitioners' attempt to obtain the same result indirectly, by reliance on a BFOQ as-

sertedly applicable to a different job than the one in issue, must again be rejected as contrary to the ADEA's purposes.

II.

THE COURT BELOW PROPERLY FOUND WILLFUL VIOLATIONS OF THE ADEA.

TWA argues that the standard for a finding of willfulness under the ADEA should be the specific intent requirement derived from criminal law. Otherwise, TWA argues, liquidated damages would be "automatic" in any case involving discriminatory treatment. On the facts of this case, a finding of willfulness would be required under any legal standard (pp. 7-13, *supra*). The issue before this Court, however, involves the appropriate legal standard for willfulness, not just whether a finding of willfulness flows automatically from a violation in a particular case.[34]

The specific intent test TWA advocates has been roundly rejected. It is inconsistent with the standard for willfulness in the FLSA and other civil statutes, and with every ADEA circuit case that has decided the issue, except one.[35] The correct standard is the willfulness standard

[34] A plaintiff's proof under the ADEA may range from compelling direct evidence of discriminatory intent in a case such as this, to a disparate impact case in which no proof of motivation is required. Willfulness, like liability, proceeds from the facts of each particular case, and it is not possible to state categorically that a finding of willfulness will or will not accompany a violation in any type of case. *See McDonnell Douglas*, 411 U.S. at 802 n.13.

[35] The Second Circuit rejected a specific intent test (A-33), as have six other courts of appeals. *Blankwell v. Sun Electric Corp.*, 696 F.2d 1176, 1184-85 (6th Cir. 1983); *Sprouck v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 155-56 (7th Cir. 1981); *Hedrick v. Hercules*, 658 F.2d 1099, 1106 (5th Cir. 1981); *Spagnuolo*, 641 F.2d

(Footnote continued on following page)

utilized in FLSA cases, which requires a showing that the defendant knew or should have known its actions were governed by the ADEA. Alternatively, the Second Circuit's test for willfulness, which requires that an employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (A-33), is modeled on an appropriate civil intent standard and satisfies the requirements in ADEA cases decided by other circuits.

A. The Test for Willfulness Under the ADEA Does Not Require Proof of Specific Intent.

TWA cites no direct statement from the ADEA legislative history that proof of specific intent is required for a finding of willfulness. An examination of the legislative history and the purposes of the ADEA demonstrates that the test for willfulness under the ADEA does not require proof of specific intent.

The liquidated damages provision of Section 7(b) originates from an amendment proposed by Senator Javits. The prior age discrimination bill would have imposed criminal penalties for willful violations. S.830, H.R. 3651, 90th Cong., 1st Sess., 113 Cong. Rec. 2794-96 (1967). Under the amended bill, these criminal penalties were eliminated and replaced by the civil liquidated damages remedy. *See* 113 Cong.Rec. 7077 (1967) (Amendment No. 125); S. 830, 90th Cong., 1st Sess., §7(b) as reported from Committee on Labor and Public Welfare, 113 Cong.Rec. 31248 (1967). As Senator Javits explained, the civil remedy would "furnish an effective deterrent to willful violations"

[35] *continued*
at 1114; *Kelly*, 640 F.2d at 990; *Mistretta v. Sandia Corp.*, 639 F.2d 588, 595 (10th Cir. 1980); *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (3d Cir. 1980). *But see Loeb*, 600 F.2d at 1020 n. 27 (citing without discussion pattern jury instruction on criminal willfulness).

and, at the same time, avoid the "difficult problems of proof which would arise under a criminal provision." 113 Cong.Rec. 7076 (1967).

Rejection of the criminal sanctions originally proposed for Section 7(b) supports the presumption that Congress intended willful violations of the ADEA to be judged by civil rather than criminal standards. Whereas willfulness in a criminal context typically requires a showing of bad purpose—or specific intent—to disobey or disregard the law,[36] in a civil context the term is most often employed to distinguish between accidental conduct and conduct which is intentional, knowing, voluntary or marked by careless disregard. Specific intent is not a prerequisite for finding liability. *United States v. Murdock*, 290 U.S. 389, 394 (1933).[37]

---

[36] The *mens rea* requirement generally remains an indispensable element of the prosecution's burden of proof in a criminal case. Typically, it has two components. First, there must be knowledge, and second, there must be a showing of bad purpose (or willfulness). *See, e.g., Morissette v. United States*, 342 U.S. 246, 250-51 (1952); *Dennis v. United States*, 341 U.S. 494 (1951). In a criminal context, willfulness refers to a bad purpose to disobey or disregard the law, and generally connotes a higher degree of specific intent than does "knowing," which has to do with the intentional doing of an act which the law forbids. *United States v. Sirkus*, 504 F.2d 818, 820 n.3 (9th Cir. 1974).

[37] Only in rare instances will courts interpret willful, as used in a civil statute, to require proof of specific intent in the criminal sense. For example, the Temporary Emergency Court of Appeals adopted a restrictive definition of willful in *Longview Refining Co. v. Shaw*, 554 F.2d 1008, 1012-13 (T.E.C.A. 1977), a case involving the Economic Stabilization Act of 1970. Based on an examination of the legislative history, the court concluded that Congress expressly intended to apply a criminal rather than a civil willfulness standard. The Third Circuit reached a similar result in *Frank Irey Jr., Inc. v. Occupational Safety and Health Review Commission*, 519 F.2d 1200, 1207 (3d Cir. 1975). There, however, the court adopted a restrictive interpretation in order to distinguish between two types of violations created under the statute—"serious violations"

(Footnote continued on following page)

Further support for rejecting a specific intent standard is provided by the FLSA, which imposes less than a specific intent requirement even in its criminal enforcement provisions. Section 16(a) of the FLSA—which Congress declined to incorporate into the ADEA when it incorporated the liquidated damages provisions of Section 16(b) and (c)—imposes criminal penalties for willful violations. Nevertheless, courts interpreting this provision have refused to apply a specific intent standard, holding instead that a willful violation of the FLSA may be established by showing that a defendant's actions were deliberate, voluntary or intentional. *Nabob Oil Co. v. United States*, 190 F.2d 478, 480 (10th Cir.), *cert. denied*, 342 U.S. 876 (1951) (FLSA does not require that an offense be committed "malevolently, with bad purpose or an evil mind"); *Hertz Driverself Stations v. United States*, 150 F.2d 923, 928-29 (8th Cir. 1945). *See also Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretations given to the incorporated law, at least insofar as it affects the new statute"). To adopt the strict criminal intent standard for the ADEA would lead to the anomalous result that a plaintiff seeking civil damages for willful age discrimination would have a higher burden to meet than the government seeking criminal sanctions for willful violations of the FLSA. The legislative history of Section 7(b) of the ADEA indicates that Congress intended precisely the opposite result.[38]

---

[37] *continued*

and "willful or repeated" violations. The court explained that a specific intent standard was necessary to maintain the gradations of penalties and violations established under the statute. Neither policy argument applies to the ADEA.

[38] *See, e.g.*, Senator Javits' comments concerning substitution of a liquidated damages remedy under the ADEA for the criminal

(Footnote continued on following page)

To make proof of specific intent a requirement for collecting civil damages under the ADEA also would run counter to the manner in which courts have interpreted willfulness under other civil statutes. The clear weight of authority holds that in a civil context "willful" will be interpreted broadly to include a wide range of conduct not limited to the specific intent requirement of criminal law. Courts have consistently followed this policy in interpreting provisions of the Internal Revenue Code[20] and in construing willfulness under other civil statutes which, like the ADEA, seek to distinguish between purposeful violators and violators whose actions are inadvertent, unintentional, or merely negligent. *See, e.g., United States v. Illinois Central Railroad Co.*, 303 U.S. 239, 243 (1933) (Railway Labor Act); *Bruce v. United States*, 621 F.2d 914, 917 n. 6 (8th Cir. 1980) (Privacy Act); *Brown-Forman Distillers Corp. v. U.S. Treasury Dept.*, 591 F.2d 375 (6th

[20] *continued*
sanctions originally proposed by the Administration. Referring to the liquidated damage provisions of Sections 16(b) and (c) of the FLSA, Senator Javits explained that the criminal provision proposed for the ADEA "is not only unnecessary but self-defeating . . . I would rather stick with the civil remedy as we do under the minimum wage law" 113 Cong.Rec. 2199 (1967). *See also Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 27 (1967) (statement of Sen. Javits) ("there is no use giving people the argument that it has criminal sanctions as a reason for refusing to cooperate or testify in investigations or proceedings").

[21] *See, e.g., United States v. Pomponio*, 429 U.S. 10, 12 (1976) (willful does not require proof of any motive other than intentional violation of a known legal duty); *United States v. Bishop*, 412 U.S. 346, 361 (1973) (Congress intended the criminal penalties for willful violations to separate the purposeful tax violators from the well-meaning but easily confused mass of taxpayers); *Kalb v. United States*, 505 F.2d 506, 511 (2d Cir. 1974) (evil motive or intent to defraud not necessary to prove willfulness); *Monday v. United States*, 421 F.2d 1210, 1215 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970) (conduct is willful if voluntary, conscious or taken with a reckless disregard for obvious or known risks).

Cir. 1979) (Federal Alcohol Administration Act); *Aero Mayflower Transit Co. v. I.C.C.*, 535 F.2d 997, 1000 (7th Cir. 1976) (Interstate Commerce Act); *Lauretex Textile Corp. v. Allton Knitting Mills*, 519 F.Supp. 730, 733 (S.D.N.Y. 1981) (Copyright Act).

TWA proposes a specific intent standard on the ground that liquidated damages are punitive rather than compensatory under the ADEA and therefore require some showing of malice or wantonness (Br. at 34-35). This Court rejected a similar argument in *Overnight Motor Transportation Co., Inc. v. Missel*, 316 U.S. 572, 583 (1942), when it held that the liquidated damages provision of Section 16(b) of the FLSA was compensatory rather than punitive. The same reasoning applies to Section 7(c) of the ADEA, which incorporates the "powers, remedies and procedures," including the liquidated damages provision, of Section 16(b) of the FLSA. *See Gibson v. Mohawk Rubber Corp.*, 695 F.2d 1098, 1102 (8th Cir. 1982); *Kalb v. Goldring*, 694 F.2d 969, 972 n.2 (1st Cir. 1982).

The similar treatment accorded prejudgment interest under the FLSA and the ADEA reinforces the argument that the ADEA's liquidated damages provision is compensatory, not punitive. It is settled that the FLSA does not permit successful plaintiffs to obtain prejudgment interest in addition to liquidated damages. As explained in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 715-16 (1945): "Allowance of interest on minimum wages and liquidated damages recoverable under §16(b) tends to produce the undesirable result of allowing interest on interest." Courts have applied a similar reasoning in ADEA cases, holding that the compensatory nature of a liquidated damages award precludes a plaintiff from recovering additional, or duplicative, compensation in the form of prejudgment in-

terest. *Gibson*, 694 F.2d at 1102; *Spagnuolo*, 641 F.2d at 1114.[30]

B. The Standard of Willfulness Is the Same Under the ADEA and FLSA, and There Is No Good Faith Exception.

The Thurston respondents adopt the brief for EEOC on this point and further respond briefly to the "good faith" argument raised by TWA and amicus United Air Lines, Inc.

TWA argues that if this Court adopts the FLSA willfulness standard and holds that a defendant's violation of the ADEA is willful if it knew *or* should have known its actions were governed by the statute, then this Court should also permit a trial court discretion to deny or reduce a liquidated damages award if the defendant shows it acted in good faith (Br. at 37, n.49). The Fifth Circuit has taken this position and is alone in concluding that the ADEA incorporates the good faith provision of Section 11 of the Portal-to-Portal Act, 29 U.S.C. §260. *Elliott v. Group Medical & Surgical Services*, 714 F.2d 556, 558 n.2 (5th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3860 (1984); *Hedrick*, 650 F.2d at 1096; *Hayes v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976).

There is no support for such an interpretation. In *Lorillard*, this Court found that "in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provi-

[30] This does not mean a plaintiff is always precluded from collecting prejudgment interest under the ADEA. Under both the FLSA and the ADEA, the award of prejudgment interest would be proper if no liquidated damages are awarded or if the liquidated damages awarded are less than the interest that would have been due from the date the back pay claim accrued. *McClanahan v. Mathews*, 440 F.2d 320, 325-26 (6th Cir. 1971); *accord*, *Gibson*, 694 F.2d at 1102 n. 9.

sions and their interpretations," 434 U.S. at 581. Indeed, Section 7 of the ADEA adopts specific provisions of both the FLSA and the Portal-to-Portal Act, but makes no reference to the good faith provision of Section 11. If Congress had intended the award of liquidated damages under the ADEA to be limited by Section 11, that provision would have been specifically incorporated. *See Loeb*, 600 F.2d at 1020; *Syvock*, 665 F.2d at 154; *Kelly*, 640 F.2d at 981; *Wehr*, 619 F.2d at 279.

Amicus United Air Lines, Inc. argues that a good faith exception is necessary to accommodate a defendant asserting a statutory affirmative defense (Br. 6-7). Absent such an exception, United suggests that a defendant will automatically be liable for liquidated damages if its defense fails.[31] This reasoning, however, ignores the fact that a finding of willfulness depends upon a defendant's state of mind at the time the discriminatory acts occurred. *Syvock*, 665 F.2d at 155.

C. Alternatively, the Second Circuit Test Satisfies the Civil Intent Standard and Other ADEA Court Tests for Willfulness.

Under the Second Circuit's willfulness test an employer will be liable for liquidated damages if it "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (A-33). This test comports with the civil standard of willfulness adopted in *Murdock*, 290 U.S. at 394:

> The word often denotes an act which is intentional, or knowing, or voluntary as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose. The

[31] United did not appeal this point in its own case, although the willfulness instruction given was patterned after *Syvock*, and therefore omitted any reference to "good faith."

> word is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by careless disregard whether or not one had the right so to act.

The "knowing and voluntary" test of *Murdock*, the model for the Second Circuit test, remains the general standard for interpreting willfulness in a civil context.[32]

The Second Circuit's test also satisfies the willfulness requirements prevalent in ADEA cases. The Fourth, Fifth and Tenth Circuits utilize the FLSA test for willfulness in ADEA cases. These courts hold that a defendant willfully violates the ADEA if it knew or should have known its actions were governed by the ADEA. *Crosland v. Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 208, 217 (4th Cir. 1982); *Hedrick*, 658 F.2d at 1096; *Mistretta*, 639 F.2d at 595. A showing that defendant knew or should have known its conduct was prohibited by the ADEA necessarily encompasses the FLSA standard for willfulness.

The Third, Sixth, Seventh and Ninth Circuits employ willfulness tests which, like the Second Circuit test, require some showing of defendant's actual or constructive knowledge that its conduct was prohibited. The Ninth Circuit requires that a violation be "knowing and intentional." *Kelly*, 640 F.2d at 980. Under the Third Circuit's formulation, a defendant's actions are willful if they are either "voluntary and not accidental, mistaken or inadvertent" or taken "in reckless disregard of consequences." *Wehr*, 619 F.2d at 283.[33] The Sixth Circuit has stated its agreement with the test in *Wehr*. *Blackwell*, 696 F.2d at 1185. Similarly, the Seventh Circuit has held that a plaintiff proves willfulness by showing that "the defendant's actions were knowing and voluntary and that he knew or reasonably should have known those actions violated of the ADEA."[34] *Syvock*, 665 F.2d at 156.

[32] *See, e.g., Pompiano*, 429 U.S. at 12 (Internal Revenue Code); *Bruce*, 621 F.2d at 917 n. 6 (Privacy Act); *Lauretez*, 519 F.Supp. 730 (Copyright Act); *Carroll v. Exxon Corp.*, 434 F.Supp. 557, 560-61 (E.D.La. 1977) (Fair Credit Reporting Act). *See also Illinois Central Railroad Co.*, 308 U.S. at 243, a case brought under the Railway Labor Act involving the willful failure to properly feed and water animals. The Court adopted *Murdock*, explaining:

> 'Willfully' means something not expressed by 'knowingly,' else both would be used conjunctively. • • • But it does not mean with intent to injure the cattle or to inflict loss upon their owner because such intent on the part of the carrier is hardly within the pale of actual experience or reasonable supposition. • • • So, giving effect to these considerations, we are persuaded that it means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.

III.

THE ADEA AUTHORIZES RECOVERY OF MONEY DAMAGES AGAINST LABOR ORGANIZATIONS THAT DISCRIMINATE ON THE BASIS OF AGE.

The ADEA expresaly prohibits labor organizations from discriminating against individuals on the basis of age. 29 U.S.C. §623(c). The Second Circuit found that ALPA had opposed the employment of flight engineers beyond age

[33] Although the Third Circuit did not explain whether the phrase "reckless disregard of consequences" referred to a defendant's knowledge of the ADEA or its knowledge that its conduct was prohibited, the Second Circuit has interpreted this standard to require a showing that the defendant knew or acted in reckless disregard as to whether its conduct was prohibited by the ADEA. *See Goodman v. Heublein, Inc.*, 645 F.2d 127, 151 (2d Cir. 1981). This interpretation of the Third Circuit's recklessness standard is consistent with the standard employed by the Seventh Circuit. *Syvock*, 665 F.2d at 154 n.5.

[34] Contrary to TWA's assertion (Br. at 31-32), the Seventh Circuit's test does not require specific intent. The "knew or reasonably should have known" language is a constructive knowledge standard derived from civil not criminal law.

sixty and had aided and abetted TWA's unlawful age discrimination (A-32 to A-33). A finding that labor organizations are subject to liability for damages for violating the ADEA is consistent with the legislative history and purpose of the ADEA, and with the explicit language of the statute.

A. The Legislative History and Purpose of the ADEA Favor Holding Unions Liable for Age Discrimination.

The substantive provisions of the ADEA were "derived *in haec verba* from Title VII" of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(c). *Lorillard*, 434 U.S. at 584.[35] The ADEA's prohibitions of discrimination on the part of labor organizations are identical to those of Title VII, and parallel the prohibitions against discrimination by employers. *Compare* 29 U.S.C. §623(a) and (c) *with* 42 U.S.C. §2000e-2(a) and (c).

In enacting the ADEA, Congress found that "the setting of arbitrary age limits regardless of potential for job performance has been a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons." 29 U.S.C. §621(a)(2). The purposes of the ADEA include "promot[ing] employment of older persons based on their ability rather than age" and "prohibit[ing] arbitrary age discrimination in employment." 29

[35] The ADEA is in fact a direct outgrowth of Title VII, as Congress, in enacting the 1964 statute, directed the Secretary of Labor to conduct a study of age discrimination in employment. Civil Rights Act of 1964, Pub. L. No. 88-352, §715, 78 Stat. 265 (1964). The Secretary's report, which recommended a "clear-cut and implemented Federal policy against arbitrary discrimination in employment on the basis of age," Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* 28 (1965), provided impetus for the enactment of the ADEA. *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. 1-2 (1967); S. Rep. No. 723, 90th Cong., 1st Sess. 1-2 (1967).

U.S.C. §621(b). The ADEA and Title VII "share a common purpose, the elimination of discrimination in the workplace." *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979). Where two statutory provisions share a common purpose, identical language, and one was the source of the other, they are to be construed similarly. *Oscar Mayer*, 441 U.S. at 756; *see Northcross v. Board of Education of Memphis City Schools*, 412 U.S. 427, 428 (1973).

Courts interpreting the ADEA have looked to cases decided under Title VII for guidance, recognizing that cases under one statute "have value as precedent for cases arising under the other." *Coke v. General Adjustment Bureau*, 640 F.2d 584, 597 (5th Cir. 1981) (en banc).[36] It is undisputed that Title VII provides for monetary awards against labor organizations. *See* ALPA's Brief in Opposition to Certiorari in No. 83-997 at 29-30; *see also Russell v. American Tobacco Co.*, 528 F.2d 357, 365-66 (4th Cir. 1975), *cert. denied*, 425 U.S. 935-36 (1976); *Kaplan v. IATSE*, 525 F.2d 1354, 1360 (9th Cir. 1975).

[36] The Fifth Circuit in *Coke* relied on Title VII cases in construing the 180-day filing requirement in 29 U.S.C. §626(d). Other circuits also have done so. *See, e.g., Morgan v. Washington Manufacturing Co.*, 660 F.2d 710, 712 (6th Cir. 1981); *Cicirone v. Textron, Inc.*, 616 F.2d 1216 (1st Cir.), *vacated and remanded*, 449 U.S. 914 (1980); *Ewald v. Great Atlantic & Pacific Tea Co.*, 620 F.2d 1193 (6th Cir.), *vacated and remanded*, 449 U.S. 914 (1980). The latter two cases were remanded in light of *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980), a Title VII case. *See also Arnonen v. Crown Zellerbach*, 642 F.2d 384, 389 (9th Cir. 1981), *cert. denied*, 101 S.Ct. 1193 (1982) (approving use of Title VII cases to construe the ADEA); *Lusk*, 600 F.2d at 1015-16 (approving application of Title VII burden and methods of proof to ADEA cases); *Geller*, 635 F.2d at 1032 (same); *Kentucki v. Frontier Airlines, Inc.*, 565 F.2d 967, 969 (10th Cir. 1978) (same); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 234-37 (5th Cir. 1976) (applying Title VII bona fide occupational qualification test in ADEA action).

Nothing in the ADEA's legislative history even remotely suggests that the statute's prohibitions against age discrimination by unions were intended to be mere paper tigers lacking any enforcement bite. To the contrary, the ADEA's purposes and legislative history make plain that Congress sought to strike out age-based discrimination by employers, labor organizations, and employment agencies.[27] A finding that labor organizations which engage in age discrimination are liable for damages is consistent with congressional intent to deter such conduct and to provide make-whole relief for aggrieved individuals.

B. The Express Language of the Statute Authorizes Monetary Relief Against Labor Organizations.

ADEA Section 7(b) provides district court jurisdiction to "grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter." 29 U.S.C. §626(b). Section 7(c) authorizes awards of "such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. §626(c).[28] There is no indication that Congress intended to exempt labor organizations from these broad remedial provisions. To the contrary,

[27] Despite the testimony of an AFL-CIO spokesman that he was "not aware of any facts that would indicate a need to forbid discriminatory practices on account of age by labor unions" and his request that the bill's provisions regarding unions be deleted, ADEA Section 4(c) was enacted as originally proposed. *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 95 (1967). *See* S. 830, 90th Cong., 1st Sess. §4(c), 113 Cong. Rec. 2794 (1967).

[28] The words "purposes of this chapter" in both subsections is significant, referring to the ADEA's goal of eradicating age discrimination in employment. *Cf. Lorillard*, 434 U.S. at 584 (Title VII and ADEA share the aim of eliminating discrimination from the workplace); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (Title VII's purpose is to make whole victims of unlawful employment discrimination).

the remedies are available in "any action" brought by "[any person aggrieved." 29 U.S.C. §626(b), (c); *see Lorillard*, 434 U.S. at 581.

ALPA's position that it is absolutely immune from liability for damages under the ADEA is based on the fact that the statute incorporates, in part, the enforcement procedures of the Fair Labor Standards Act, 29 U.S.C. §201 (FLSA).[29] In opting for FLSA-type enforcement, Congress rejected several alternative proposals.[30] As this Court has noted:

> The bill that was ultimately enacted is something of a hybrid, reflecting, on the one hand, Congress' desire

[29] Although enforcement authority initially was given to the Secretary of Labor, it was transferred in July 1979 to the U.S. Equal Employment Opportunity Commission. 44 Fed. Reg. 37974 (1979).

[30] These included the following:

1. Adopting the more restrictive mechanisms of Title VII, with enforcement by the EEOC. *Lorillard*, 434 U.S. at 579; *see* 112 Cong. Rec. 25823-24 (1966).

2. National Labor Relations Act-type enforcement, allowing the Secretary of Labor to issue cease and desist orders enforceable in the Courts of Appeals, with no private right of action. As originally proposed, this measure authorized the issuance of complaints against labor organizations as well as employers. S. 830, 90th Cong., 1st Sess. §§7(d)(1) and (2)(a), 113 Cong. Rec. 2795 (1967). *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. 5, *reprinted in* [1967] U.S. Code Cong. & Ad. News 2223.

3. Making discrimination based on age unlawful under the FLSA. H.R. 13712, 89th Cong., 2d Sess., 112 Cong. Rec. 20819 (1966). *See* S. Rep. No. 1487, 89th Cong., 2d Sess. 79-80 (1966). Congress' rejection of this proposal is particularly significant in light of ALPA's reliance on the literal language of the FLSA and cases under the Equal Pay Act of 1963 (EPA), 29 U.S.C. §206(d). While the EPA is an amendment to the FLSA, the ADEA is a separate free-standing statute with significantly different prohibitions and remedies. *See Nation v. Bank of California*, 72 F.R.D. 550, 554 & n.9 (N.D. Cal. 1976), *aff'd in part, remanded in part*, 649 F.2d 691 (9th Cir. 1981); *Brennan v. Emerald Homes, Inc.*, 410 F.Supp. 1067 (S.D.N.Y. 1976), cited by the court below (A-30), is thus inapposite.

> to use an existing statutory scheme and a bureaucracy with which employers and employees would be familiar and, on the other hand, its dissatisfaction with some elements of each of the pre-existing schemes.

Lorillard, 434 U.S. at 578; *see EEOC v. Chrysler Corp.*, 546 F.Supp. 54, 59-60, 73-75 (E.D. Mich. 1982), *aff'd*, 733 F.2d 1183 (6th Cir. 1984).[41]

ADEA Section 7(b), 29 U.S.C. §626(b), provides that the ADEA "shall be enforced in accordance with the powers, remedies and procedures" of FLSA Sections 16 and 17, 29 U.S.C. §§216, 217. ALPA argues that FLSA Section 16, by its terms, applies only to employers, and Section 17 provides for injunctive relief only.[42] From this, ALPA concludes that Congress immunized labor organizations from financial liability for age discrimination.

ADEA Section 7(b) further provides, however, that "[a]ny act prohibited under Section 4 of this Act [29 U.S.C. §623] shall be deemed to be a prohibited act under Section 15 of the Fair Labor Standards Act [29 U.S.C. §215]." 29 U.S.C. §626(b). Under FLSA Section 15(a)(2), it is unlawful for "any person" "to violate any of the provisions of Section 206 or 207 of this title . . .," which by their terms apply only to employers.[43] Section 15(a)(3) prohibits "any person" from "discharg[ing] or in any other

[41] As noted by Senator Javits, the ADEA's principal sponsor, "the enforcement techniques of the FLSA have been incorporated by reference . . . with appropriate modifications necessary to accommodate them to the purposes of this legislation." S. Rep. No. 723, 90th Cong., 1st Sess. 13-14 (1967) (individual views of Mr. Javits).

[42] EEOC is correct in its brief in noting that courts may grant equitable relief (including back pay against unions) to private parties under Section 17 in ADEA actions, although such relief is available under the FLSA only in actions brought by the government.

[43] These sections refer to the minimum wage and overtime compensation, respectively.

> manner discriminat[ing] against any employee" who has filed a complaint or has initiated or testified in proceedings under or related to the FLSA.[44] The FLSA defines "person" to include "any individual, partnership, association, corporation, business trust, legal representative, or *any organized group of persons*." 29 U.S.C. §203(a) (emphasis added).

The prohibitions of FLSA Section 15 apply to labor organizations. *Bowe v. Judson C. Burns, Inc.*, 137 F.2d 37, 38-39 (3d Cir. 1943). *See Mack v. United States*, 136 F.2d 679, 680 (6th Cir. 1943) ("[T]he differentiation between the prohibitions in other sections of the [FLSA] directed to 'employer,' and those [in §15] to 'any person,' is significant of the intent of Congress"); *Wirtz v. Ross Packing Co.*, 367 F.2d 549, 550 (5th Cir. 1966) ("The prohibitions of Section 15(a)(3) are . . . unlimited, for they are directed to 'any person.' ").

Violations of FLSA Section 15(a)(2) by any person are therefore deemed "employer" violations of FLSA Sections 6 or 7 and are actionable under FLSA Section 16(b), which provides that "any employer who violates the provisions of [29 U.S.C. §§206, 207] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation. . . ." Bringing the statutory construction full circle, the ADEA provides that "[a]mounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title. . . ." 29 U.S.C. §626(b).

[44] This FLSA provision is similar to ADEA Section 4(d), which prohibits employers, employment agencies, and labor organizations from discriminating against individuals who oppose practices outlawed by the ADEA or who have filed charges, testified, assisted, or participated in an investigation, proceeding, or litigation under the ADEA. 29 U.S.C. §623(d).

In summary, amounts owing to individuals aggrieved under the ADEA are deemed minimum wage or overtime compensation. It is unlawful under FLSA Section 15 for any person to fail to pay the minimum wage or overtime. Any violation of ADEA Section 4, including unlawful conduct by labor organizations, also violates FLSA Section 15. Thus, any person, including a union, whose actions violate the prohibitions of ADEA Section 4 is liable to the aggrieved party for amounts owing.

ALPA's reliance upon the literal language of FLSA Sections 6 and 7 ("no employer") would abrogate the sentence in ADEA Section 7(b) which provides that Section 4 violations are considered violations of FLSA Section 15. It is elementary that where possible, a statute should not be construed in such a way as to make any of its provisions superfluous or redundant. *See, e.g. Patagonia Corp. v. Board of Governors of the Federal Reserve System*, 517 F.2d 803, 813 (9th Cir. 1975); 2A C. Sands, *Sutherland Statutory Construction* §§46.06, 46.07 (4th ed. 1973); *cf. Oscar Mayer*, 441 U.S. at 757 (rejecting an interpretation of ADEA Section 14(b) which would strip it of all meaning). By providing that violations of ADEA Section 4 are also violations of FLSA Section 15, Congress intended that all persons subject to the ADEA's prohibitions would be liable for legal and equitable relief under ADEA Section 7. *See EEOC v. ALPA*, 499 F.Supp. 1003, 1009 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981) (labor organization liable); *Brennan v. Hughes Personnel, Inc.*, 8 Empl. Prac. Dec. [CCH] ¶9571 (W.D. Ky. 1974) (employment agency liable).

The analysis in *Neuman v. Northwest Airlines, Inc.*, 28 Fair Empl. Prac. Cas. [BNA] 1488 (N.D. Ill. 1982), cited by the court below (A-36), is flawed in several respects. First, the court ignored the ADEA's cross-reference to FLSA Section 15, as discussed above. Next, the court relied solely on cases decided under the Equal Pay Act,

which is an amendment to the FLSA. *See* note 40, *supra*. The ADEA, in contrast, is a separate statute with broader coverage, prohibitions, and relief. Finally, the *Neuman* court incorrectly assumed that the word "remedies" in ADEA Section 7(b), 29 U.S.C. §626(b), refers to the parties from whom relief may be sought. This distorts the traditional meaning of the word as simply the procedure by which relief is obtained, without reference to the parties against whom it may be sought. *See Chelentis v. Luckenbach Steamship Co.*, 247 U.S. 372, 384 (1918) ("a remedy is the means employed to enforce a right or redress an injury").

C. ALPA Willfully Violated the ADEA.

The Second Circuit held that ALPA's conduct violated ADEA Section 4(c)(2), 29 U.S.C. §623(c)(2).[45] The court found that "ALPA actively campaigned to persuade TWA to retain its age-60 retirement policy for all flight deck positions, opposed TWA's unilateral action in August 1978 to attempt partial compliance with the ADEA and induced TWA to impose further discriminatory restrictions on captains seeking to downbid to flight engineer status." (A-32 to A-33).[46] Further, the court noted that ALPA's declara-

[45] Both the Thurston respondents and the EEOC alleged in their complaints that ALPA had willfully violated 29 U.S.C. §623(c)(1), (2) and (3). (J.A. 16, 66-67, 92, 95-96). The Thurston respondents also alleged a willful violation of 29 U.S.C. §623(d) by ALPA. The facts support findings of liability under all of these provisions.

[46] ALPA contends that it is not liable to the Thurston respondents, based on the reference to "EEOC plaintiffs" on A-33. It is clear, however, from the discussion of ALPA's liability (A-31 to A-33) that the court found ALPA's unlawful actions to have harmed both groups of plaintiffs. *See* A-31 at n.18. Furthermore, the court entered judgment for appellants against ALPA and directed that each plaintiff be awarded such relief as he was entitled to against each defendant (A-35).

tory judgment action was an attempt "to use the ADEA to cut off the rights of the older flight engineers" (A-20) and that "the purpose of the ADEA would be frustrated by ALPA's declaratory action" (*id.*).

The record discloses a willful course of conduct by ALPA, seeking to deprive its most senior members of up to ten years of productive employment[47] and to delay implementation of the ADEA as long as possible. (pp. 11-13, *supra*). The ADEA's penalties for willful misconduct were fully appreciated by ALPA. Just days after TWA announced its change in policy, ALPA's president and outside counsel expressed the opinion that "if we deny a man the opportunity to work beyond age 60 when the Company has offered him this opportunity, ALPA would quite likely be liable for a considerable amount of money." (R. 102, Ex. 37 at 4).

In addition to its actions to prevent all service beyond age sixty,[48] ALPA also engaged in activity to deprive and

[47] Respondents Thurston, Clark, and Parkhill had 26, 24, and 23 years of seniority, respectively, at the time of their involuntary retirements (J.A. 919-21, 911-12, 903-05).

[48] The conduct at issue here is consistent with ALPA's opposition to service after age sixty on other airlines. ALPA has been a party defendant in three other cases in which flight deck crewmembers have sought to continue their employment. *Ferraro v. Braniff Airways, Inc.*, No. CA 3-80-1273-R (N.D. Tex.) (consent decree entered September 30, 1982); *Fenton v. The Flying Tiger Line, Inc.*, No. CV-81-4419-RJK (C.D.Cal.) (consent decree entered June 28, 1984); *Newman v. Northwest Airlines, Inc.*, No. 79 C 1570 (N.D.Ill.) (consent decree entered April 5, 1985). ALPA also has been a third-party defendant in four other cases. *Worley v. Continental Air Lines, Inc.*, No. CV-80-1110-WMB (C.D.Cal.) (consent decree entered December 27, 1982), appeal pending, Nos. 83-5284 *et al.* (9th Cir.); *Monroe v. United Air Lines, Inc.*, 31 Empl.Prac.Dec. (CCH) ¶33,830, 33,831 and 32 Empl.Prac.Dec. ¶33,668 (N.D.Ill. 1982), rev'd and remanded, Nos. 82-1243 *et al.* (7th Cir. May 30, 1984); *Shaw v. Western*, 544 F.Supp. 33; *Richardson v. Alaska Airlines, Inc.*, No. C81-974V (W.D. Wash.) (consent decree entered Nov. 1, 1982), appeal pending, No. 83-4021 (9th Cir.).

limit the employment opportunities of its oldest members. Immediately after TWA announced that it would employ age sixty flight engineers, ALPA submitted its discriminatory proposals to modify the pilot contract (pp. 12-13, *supra*). One of ALPA's proposals was that, in the event of a furlough, flight engineers over sixty would be the first crewmembers laid off, "starting with the most senior pilot" of that group. These crewmembers would be recalled only after the other furloughees, who would be among the most junior crewmembers at TWA (R. 102, Ex. 36 (817(AXII)). ALPA also prevailed upon TWA to impose restrictions on age sixty downbidders to make it more difficult for them to achieve flight engineer status (A-11 to A-12). Respondents are entitled to full statutory relief against ALPA, including money damages, for the union's willful violation of the ADEA.

CONCLUSION

For the foregoing reasons, the Second Circuit's decision that TWA and ALPA violated the ADEA and that the violation was willful should be affirmed. The portion of

the decision holding ALPA not liable for damages should be reversed.

Respectfully submitted,

RAYMOND C. FAY
(Counsel of Record)
ALAN M. SILVER
SUSAN D. GILAND
ELIZABETH H. CAMERON
HALEY, BADER & POTTS
11 S. LaSalle Street, Suite 1600
Chicago, Illinois 60603
(312) 782-7606

Attorneys for Respondents
Harold H. Thurston, Christopher J. Clark, and C.A. Parkhill

July 1984

REPLY

BRIEF

Nos. 83-997, 83-1325

Office - Supreme Court, U.S.
SEP 24 1984
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and TRANS WORLD AIRLINES, INC.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF TRANS WORLD AIRLINES, INC.
Petitioner in No. 83-997
Respondent in No. 83-1325

DONALD I STRAUBER
PETER N. HELLMAN
CHADBOURNE, PARKE, WHITESIDE & WOLFF
Of Counsel

HENRY J. OECHSLER, JR.
30 Rockefeller Plaza
New York, N.Y. 10112
(212) 541-5800
Counsel of Record for Trans World Airlines, Inc.

TABLE OF CONTENTS

PAGE

INTRODUCTION 2

I. THE PLAINTIFFS HAVE FAILED TO PROVE THAT TWA'S AGE 60 POLICY WAS UNLAWFUL 2

A. The Undisputed Facts Show How TWA Has Satisfied the ADEA 2

B. The Plaintiffs Ignore the Importance of the Need for a Vacancy in TWA's Seniority System 4

C. The Application of TWA's "Age 60" Policy Has Been Nondiscriminatory 7

II. THE STANDARD FOR WILLFULNESS ADVOCATED BY THE PLAINTIFFS WOULD NULLIFY THE CLEAR CONGRESSIONAL INTENT OF TWO-TIERED LIABILITY UNDER THE ADEA 9

III. THE PROCEDURAL ARGUMENTS RAISED BY ALPA ARE WITHOUT MERIT AND SHOULD NOT DETER A HOLDING THAT A UNION CAN BE MONETARILY LIABLE UNDER THE ADEA 11

TABLE OF AUTHORITIES

Cases	PAGE
Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	13
Cafferty v. *TWA*, 488 F. Supp. 1076 (W.D. Mo. 1980)	6
Connecticut v. *Teal*, 457 U.S. 440 (1982)	8
Criswell v. *Western Air Lines, Inc.*, 514 F. Supp. 384 (C.D. Cal. 1981), *aff'd*, 709 F.2d 544 (9th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3722 (U.S. March 16, 1984) (No. 83-1545)	8
De La Rosa Sanchez v. *Eastern Airlines, Inc.*, 574 F.2d 29 (1st Cir. 1978)	6
Director, OWCP v. *Perini North River Associates*, 459 U.S. 297 (1983)	11
EEOC v. *ALPA*, 489 F. Supp. 1003 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981)	13, 14
EEOC v. *CBS, Inc.*, ___ F.2d ___, 35 FEP Cases 1127 (2d Cir. 1984)	2
EEOC v. *Prudential Federal Savings and Loan Association*, ___ F.2d ___, 35 FEP Cases 783 (10th Cir. 1984)	10
Firefighters Local Union No. 1784 v. *Stotts*, ___ U.S. ___, 104 S. Ct. 2576 (1984)	5, 6
Ford Motor Co. v. *EEOC*, 458 U.S. 219 (1982)	6
Furnco Construction Corp. v. *Waters*, 438 U.S. 567 (1978)	6
Gay v. *Waiters' and Dairy Lunchmen's Union, Local No. 30*, 489 F. Supp. 282 (N.D. Cal. 1980), *aff'd*, 694 F.2d 531 (9th Cir. 1982)	3
Haskell v. *Kaman Corp.*, ___ F.2d ___, 35 FEP Cases 941 (2d Cir. 1984)	10
Hazelwood School District v. *United States*, 433 U.S. 299 (1977)	3

PAGE

Hodgson v. *Sagner, Inc*, 326 F. Supp. 371 (D. Md. 1971), *aff'd sub nom. Hodgson* v. *Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972) 14

Iervolino v. *Delta Air Lines, Inc.*, No. C81-2327A (N.D. Ga. June 22, 1984) 8

INS v. *Chadha*, __ U.S. __, 103 S. Ct. 2764 (1983) 2

Johnson v. *American Airlines, Inc.*, 18 (CCH) Av. Cas. 17,177 (N.D. Tex. 1983), *appeal pending*, No. 83-1610 (5th Cir.) 8

Larson v. *Valente*, 456 U.S. 228 (1982) 12

Lorillard v. *Pons*, 434 U.S. 575 (1978) 9

Monroe v. *United Air Lines, Inc.*, 736 F.2d 394 (7th Cir. 1984) 8

Northwest Airlines, Inc. v. *TWU*, 451 U.S. 77 (1981) .. 13

Peters v. *Kiff*, 407 U.S. 493 (1972) 5

Procunier v. *Navarette*, 434 U.S. 555 (1978) 5

Teamsters v. *United States*, 431 U.S. 324 (1977) 4

United States v. *Campos-Serrano*, 404 U.S. 293 (1971) . 9

Statutes

Age Discrimination in Employment Act:
Section 7(b), 29 U.S.C. § 626(b) 9, 14

Equal Pay Act, 29 U.S.C. § 206(d) 14

Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* 14

Federal Aviation Act:
Section 601(b), 49 U.S.C. § 1421(b) 9

Railway Labor Act:
Section 6, 45 U.S.C. § 156 6
Section 204, 45 U.S.C. § 184 6

Other Authorities

Schlei and Grossman, *Employment Discrimination Law* (2d ed. 1983) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-997, 83-1325

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and TRANS WORLD AIRLINES, INC.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF TRANS WORLD AIRLINES, INC.
Petitioner in No. 83-997
Respondent in No. 83-1325

INTRODUCTION

The briefs by the other parties highlight the difficult situation which confronted TWA when it sought to comply with the ADEA amendments. On the one hand, the *Thurston* plaintiffs and the EEOC contend that TWA and ALPA are jointly liable for a policy which went further in accommodating downbidding Captains than any other trunk airline.[1] On the other hand, ALPA says that neither it nor TWA should be liable but that if liability is jointly imposed, then TWA alone should be stuck with total monetary liability. In the final analysis, Judge Van Graafeiland's observation below that TWA is really worthy "of receiving commendation for what it has done" (A-36) is fully supported by the record.

I. THE PLAINTIFFS HAVE FAILED TO PROVE THAT TWA'S AGE 60 POLICY WAS UNLAWFUL

A. The Undisputed Facts Show How TWA Has Satisfied the ADEA

Stripped of the plaintiffs' rhetoric, this is not a complex case. This Court need only focus on certain undisputed facts in its examination of TWA's "age 60" policy:

1. There is an FAA rule which prohibits Captains and First Officers from serving in those positions beyond age 60, and that rule is subject to the BFOQ provision of the ADEA (A-7 to A-8);

---

[1] As noted in TWA's opening brief (p. 8 n.8), there is a threshold question whether the EEOC has the authority to enforce the ADEA in view of *INS* v. *Chadha*, ___ U.S. ___, 103 S. Ct. 2764 (1983). The issue is now of heightened importance because the Second Circuit, from which this case is appealed, has recently ruled that *Chadha* bars the EEOC from enforcing the ADEA. *EEOC* v. *CBS, Inc.*, ___ F.2d ___, 33 FEP Cases 1127 (2d Cir. 1984). While this does not moot the claims of the private plaintiffs (and therefore does not moot the issues in this case), there is the obvious question of the EEOC's status to represent anyone here. TWA reserves all rights in this regard in the event of remand.

2. The bidding procedures of the TWA Working Agreement are the heart of the contractual seniority system and serve as the basic mechanism in deploying the pilot work force (J.A. 185, ¶ 3);

3. In order for a bid to be awarded, there must be a vacancy (TWA Op. Br., pp. 9-10);

4. The plaintiffs "could not establish that there were flight engineer vacancies at the time they applied to transfer" (A-23);

5. Unable or unwilling to change status, the plaintiffs reached age 60 as Captains, a position in which they no longer could lawfully perform (A-10);

6. "Most of the 70 captains and first officers who have downbid for flight engineer positions successfully obtained that status before reaching 60" (A-10). In fact, it is "unrebutted" that 83% succeeded in that regard (A-61 n.8);[2]

7. In a few situations unrelated to age, a vacancy (and the award of a bid) is not required in order to change status (TWA Op. Br., pp. 12-13);

---

[2] As the EEOC concedes in its brief (p.17), only a "handful" of Captains were not awarded a Flight Engineer vacancy. The *Thurston* plaintiffs also do not challenge the accuracy of TWA's 83% overall success rate, but they do now try to distort TWA's data by making their own analysis limited to the transitional year of 1978 (Th. Br., p. 5). However, that is contrary to this Court's decision in *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), to examine statistical data in employment discrimination cases on the basis of "cumulative results." *Guy* v. *Western and Dairy Lunchmen's Union, Local No. 30*, 489 F. Supp. 282, 308 (N.D. Cal. 1980), *aff'd*, 694 F.2d 131 (9th Cir. 1982). *See generally* Schlei and Grossman, *Employment Discrimination Law* 1364-65 (2d ed. 1983).

8. TWA was the *only* trunk airline to voluntarily permit Captains to downbid and serve past age 60 (J.A. 487-88; 492, No. 12).[5]

In view of these undisputed facts, the liability issue to be determined is whether the ADEA requires TWA to make the same accommodation for an age-related reason as it does for a non-age reason, or whether such a requirement is, as the dissent notes below, "like comparing apples with oranges" (A-35 to A-36). Plaintiffs do not, and cannot, dispute the fact that the few non-age accommodations in the Working Agreement were just as available to them. Nevertheless, they want the same accommodations simply because of their age. TWA's policy was in full compliance with the law because the ADEA does not mandate that type of preferential treatment. Moreover, TWA's effort to treat everyone equally was based on legitimate reasons other than age and was the result of a bona fide seniority system (TWA Op. Br., pp. 17-30).

B. The Plaintiffs Ignore the Importance of the Need for a Vacancy in TWA's Seniority System

The EEOC contends that the absence of a Flight Engineer vacancy "simply begs the question" at issue (EEOC Br., p. 19 n.26). However, this Court has recognized that "the absence of a vacancy in the job sought" can be fatal to establishing a prima facie case. *Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977). Even where there has been discrimination, an adversely affected employee "is not automatically entitled to have a non-minority employee laid off to make room for him.

---

[5] Although they did not do so before the Second Circuit, the Thurston plaintiffs now seek to belittle (but do not dispute) TWA's performance in this regard (Th. Br., pp. 3-4). However, they cannot evade their own admission that as of March 25, 1982, "TWA [was] the only trunk airline which has, absent a court order, permitted Captains to downbid to Flight Engineer and serve in that status beyond age 60" (J.A. 487-88). Significantly, all the consent decrees to which they now cite in their brief (p. 3 n.2) are dated no earlier than December 27, 1982—over four years after TWA adopted its "age 60" policy in August 1978.

He may have to wait until a vacancy occurs.'" *Firefighters Local Union No. 1784* v. *Stotts*, ____ U.S. ____, 104 S. Ct. 2576, 2588 (1984).[6]

Here, the undisputed facts show that when there have been vacancies, downbidding Captains have exercised their seniority rights to obtain Flight Engineer positions. Indeed, none of the plaintiffs challenges the bona fides of TWA's seniority system. While the plaintiffs dismiss the applicability of TWA's pilot seniority system to this case (Th. Br., p. 21; EEOC Br., p. 22), the fact remains that plaintiffs could not become Flight Engineers under the Working Agreement without a vacancy.[7]

Nothing in law suggests that TWA should have so altered its seniority system for plaintiffs. As this Court recently reiterated in *Firefighters*, *supra*, 104 S. Ct. at 2583-84 n.4, "[s]eniority has traditionally been, and continues to be, a matter of great

---

[6] Emphasis in quotations is added unless otherwise noted.

Counsel for the Thurston plaintiffs has himself recognized that a lack of a vacancy is a legitimate and common explanation for an individual's failure to obtain a job. *See* Br. for Resp., in Opp. to Pet. for Cert. in *Western Air Lines, Inc.* v. *Criswell*, No. 83-1545, pp. 7-8 (stating in another "age 60" case that prior "Criswell's bid was denied, not because of a lack of openings or any other usual business reason").

[7] Plaintiffs also suggest that this Court should not consider TWA's reliance on its seniority system since it was not specifically cited as one of the "questions presented" in TWA's petition for certiorari (Th. Br., p. 20; EEOC Br., p. 22 n.20). However, Rules 15.1(a) and 21.1(a) of this Court fully recognize that the "questions presented" for review "will be deemed to comprise every subsidiary question fairly included therein."

In this regard, the EEOC conceded in its memorandum in opposition to ALPA's cross-petition for certiorari in No. 83-1525 (p.2) that ALPA's "BFOQ" issue "merely raises" just such a "'subsidiary issue'" to TWA's petition. If that is true for ALPA's "BFOQ" question, then it is equally true for TWA's reliance on its seniority system (all was discussed by both courts below (A-25 to A-28, A-57) and noted in TWA's petition for certiorari (p.20 n.*). Accord, e.g., *Procunier* v. *Navarette*, 434 U.S. 555, 559-60 n.6 (1978); *Peters* v. *Kiff*, 407 U.S. 493, 497 (1972).

concern to American workers." Those workers, including TWA's pilot force, develop legitimate seniority expectations which are honored by adherence to the bona fide seniority provisions of the Working Agreement. If TWA "does not vigorously defend the implementation of its seniority system, it will have to cope with deterioration in employee morale, labor unrest, and reduced productivity." *Firefighters*, *supra*, 104 S. Ct. at 2591 (O'Connor, J., concurring).

TWA's policy was an effort to accommodate the requirements of *both* the ADEA and the Railway Labor Act (TWA Op. Br., p. 21 n.24).[6] It is well-established that courts are "generally less competent than employers to restructure business practices," *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 578 (1978), and that is particularly true where the potential "disruption of the existing seniority system [could] violate a collective-bargaining agreement, with all that such a violation entails for the employer's labor relations." *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 229 (1982).

6 In their briefs, plaintiffs continue to make light of TWA's clear statutory obligation under Section 6 of the Railway Labor Act ("RLA") to maintain the same "rates of pay, rules, or working conditions" (45 U.S.C. § 156). The *Thurston* plaintiffs ignore this issue completely, and the EEOC's attempted rebuttal (EEOC Br., p. 25 n.31) ignores the fact that the Working Agreement did not contemplate downbidding after age 60. Indeed, the EEOC concedes "there is no claim that any of the pilots here involved have transfer rights under the express contractual provisions of the Working Agreement." (EEOC Br., p.17 n.25).

To have adopted the type of "remedial" relief suggested by the EEOC would have subjected TWA to obvious labor grievances for violating the Working Agreement, and the forum to hear those grievances, the TWA system board of adjustment, is by law limited in its jurisdiction to the Working Agreement. See RLA, Section 204, 45 U.S.C. § 184; *De La Rosa Sanchez* v. *Eastern Airlines, Inc.*, 574 F.2d 29, 31-32 (1st Cir. 1978), and cases cited therein. As it was, TWA's "age 60" policy prompted not only ALPA's lawsuit (J.A. 108-15), but it also prompted a separate lawsuit alleging RLA violations by a group of furloughed Flight Engineers. See *Cafferty* v. *TWA*, 488 F. Supp. 1076 (W.D. Mo. 1980).

C. The Application of TWA's "Age 60" Policy Has Been Nondiscriminatory

In an effort to divert this Court's attention from TWA's "unrebutted" 83% success rate for downbidding Captains (A-61 n.8) and its 100% success rate for "career" Flight Engineers, the plaintiffs have sought to emphasize in their briefs the period of time when TWA was seeking to formulate its "age 60" policy (*Th.* Br., pp. 9-11; EEOC Br., pp. 4-6). During that period, there were obvious disagreements within the Company as to what the new law required, and these disparate views were strongly held by the various individuals involved.[7]

However, the *ultimate* Company policy permitted service by Captains beyond age 60 "in accordance with the seniority and bidding procedures of the Working Agreement" (A-9), and this was at a time when no other airline was allowing *any* Captains to downbid and serve beyond age 60 (J.A. 561-62). The Second Circuit recognized that "TWA *immediately* reinstated those who had been in flight engineer status on their 60th birthdays and had been retired after April 6, 1978." (A-9).[8] The Second

7 It should be noted that many of the record references now cited by the plaintiffs (particularly the *Thurston* plaintiffs) were previously so insignificant to any issue in this case that they were not even designated by anyone to be part of the Joint Appendix. Indeed, the Second Circuit viewed the period when the Company was formulating its policy to be so insignificant that it devoted only one sentence of its entire decision to this period, and that sentence only related to TWA's failure "to agree with ALPA on a revision of TWA's retirement program" (A-9). It is only now that this period has magically become so important to the plaintiffs.

8 Included in those reinstated was an International Relief Officer ("IRO") who was viewed as being in the Flight Engineer status for the purposes of TWA's "age 60" policy (J.A. 1023-24). This is criticized by the plaintiffs (*Th.* Br., p. 6; EEOC Br., p. 7 n.11), but IRO's enjoy a special contractual "prior right" (not based on age) to the Flight Engineer seat (J.A. 609, Art. 1; 351-52, ¶ 5.A) while none of the plaintiffs is covered by the 1962 Agreement providing for such "prior rights" (J.A. 616; 492, No. 11). Moreover, TWA is bound by an arbitrator's ruling that an IRO "assumes the position of, and performs the duties of, the Flight Engineer." (J.A. 607). See also J.A. 208-14.

Circuit also noted that "*[m]ost* of the 70 captains and first officers who have downbid for flight engineer positions successfully obtained that status before reaching 60." (A-10). In addition, TWA has instituted a special program of guidance for Captains approaching age 60 whereby such Captains specifically meet with a Company representative to discuss the options available to them. A "Memo to File" is prepared after the meeting which states that the individual Captain is "thoroughly briefed as to the responsibilities associated with his transition to a Flight Engineer status." (J.A. 481-83). Those Captains who wish to serve beyond age 60 sign a letter expressing that intent (J.A. 484-86).

In view of this undisputed record,[9] it would be highly ironic to hold TWA liable for age discrimination when two other major carriers, American Airlines and Delta Air Lines, have successfully defended on safety grounds their "age 60" policies of allowing *no* downbidding Captains beyond age 60. See *Johnson* v. *American Airlines, Inc.*, 18 (CCH) Av. Cas. 17,177 (N.D. Tex. 1983), *appeal pending*, No. 83-1610 (5th Cir.); *Iervolino* v. *Delta Air Lines, Inc.*, No. C81-2327A (N.D. Ga. June 22, 1984).[10] Like American and Delta, TWA has "to

9 The *Thurston* plaintiffs (Br., pp. 19-20) seek to disparage TWA's performance by relying on *Connecticut* v. *Teal*, 457 U.S. 440 (1982). However, *Teal* fully recognized that where there is a question of intent, an employer's "nondiscriminatory 'bottom line' " (such as TWA's 83% success rate) can "assist an employer in rebutting the inference that particular action [*e.g.*, TWA's policy] had been intentionally discriminatory" (*id.* at 454).

10 See also *Monroe* v. *United Air Lines, Inc.*, 736 F.2d 394 (7th Cir. 1984), where the Seventh Circuit recently reversed and remanded for a new trial on whether United's policy of allowing *no one* to serve beyond age 60 was permissible under the ADEA. Aside from TWA, there is now only one other carrier, Western Air Lines, which is subject to a finding of age discrimination for its "age 60" policy. See *Criswell* v. *Western Air Lines, Inc.*, 514 F. Supp. 384 (C.D. Cal. 1981), *aff'd*, 709 F.2d 544 (9th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3722 (U.S. March 16, 1984) (No. 83-1545). In contrast to TWA, Western's "age 60" policy prohibited anyone from serving in the cockpit beyond age 60.

perform [its] services with the highest possible degree of safety" under Section 601(b) of the Federal Aviation Act (49 U.S.C. § 1421(b)). The fact that TWA's Vice President of Flight Operations also felt strongly for safety reasons about former Captains in the cockpit beyond age 60 is perfectly understandable in the context of the uncertain status of the law and TWA's duty to comply with the Federal Aviation Act.[11]

II. THE STANDARD FOR WILLFULNESS ADVOCATED BY THE PLAINTIFFS WOULD NULLIFY THE CLEAR CONGRESSIONAL INTENT OF TWO-TIERED LIABILITY UNDER THE ADEA

Both the *Thurston* plaintiffs and the EEOC state that the proper standard for "willfulness" under the ADEA requires only "that the defendant knew or should have known its actions were *governed* by the ADEA." (*Th.* Br., p. 25; EEOC Br., p. 32). Under such a standard, any employer which was *aware* that the ADEA covered its employees would be automatically subject to double damages once there was a finding of liability. That would completely emasculate the ADEA's two-tiered standard of liability which Congress clearly established (TWA Op. Br., pp. 31-32).

Congress expressly chose language in Section 7(b) of the ADEA indicating that liquidated damages were to be the exception and not the rule: "*Provided*, That liquidated damages shall be payable *only* in cases of *willful* violations of this Act." (29 U.S.C. § 626(b)). Accord, *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978). By ignoring the word "only," the plaintiffs have thereby forgotten the cardinal principle that a statute " 'ought . . . to be so construed that . . . no clause, sentence, *or word* shall be superfluous, void, or insignificant.' " *United States* v. *Campos-Serrano*, 404 U.S. 293, 301 n.14 (1971).

11 See J.A. 1002; R. 165, pp. 47-48 (J.A. 19). The Company's ultimate policy (J.A. 425) was adopted with the concurrence of both Flight Operations (Mr. Frankum) and Labor Relations (Mr. Crombie), and the actual text of the policy was written by Mr. Hilly of Labor Relations (J.A. 1031-32).

The recent Second Circuit opinion in *Haskell* v. *Kaman Corp.*, ____ F.2d ____, 35 FEP Cases 941 (2d Cir. 1984), shows the folly of the slight willfulness standard urged by the *Thurston* plaintiffs and the EEOC. Writing for the panel in *Haskell*, Judge Mansfield (the author of the majority opinion here) reaffirmed the holding in *ALPA* that "a plaintiff 'need not prove a specific intent to violate the ADEA' " for willfulness purposes (*id.* at 947). Instead, he said:

> "[A]lthough there is a split of authority on the extent of knowledge on the part of the employer required to establish willfulness, we believe that a plaintiff must at least *show that the employer was aware that its conduct was governed by the ADEA* . . ." (*id.* at 947-48).

Obviously, such a minimal standard almost mandates double damages, for virtually any employer is going to be "aware that its conduct was governed by the ADEA."[12]

The *Haskell* opinion is also of significance since it demonstrates the equally slight showing required to find willfulness under the test of an employer acting in "reckless disregard":

> "[T]he *failure* of such an employer *to investigate the matter* [*i.e.*, whether the conduct was governed by the ADEA] . . . *would amount to reckless disregard* for whether its conduct violated the Act." (*Id.* at 948).

12 The EEOC itself recognizes that "only in the rarest cases will employers be deemed to be reasonably unaware of the ADEA. As the court below noted (Pet. App. A34), the Act itself requires employers to post notices of its applicability. 29 U.S.C. § 627." (EEOC Br., p. 39 n.45).

In this regard, the Tenth Circuit has recently adopted the "aware that conduct is governed by the ADEA" test for willfulness. *EEOC* v. *Prudential Fed. Sav. and Loan Ass'n*, ____ F.2d ____, 35 FEP Cases 783 (10th Cir. 1984). Its factual finding further shows how such a test dilutes the meaning of "willful":

> "The record contains testimony by Prudential executives and members of the board demonstrating that *the company in fact knew its employees were protected by the ADEA* . . . [W]e conclude as a matter of law that Prudential's conduct . . . constituted a willful violation within the meaning of the ADEA." (*Id.* at 790).

In view of such language, the "reckless disregard" test urged by the *Thurston* plaintiffs (*Th.* Br., p. 25) hardly begins to probe the ultimate question of discriminatory animus on the part of the employer. If all that is required for "reckless disregard" is a showing that an employer did not "investigate" whether its conduct "was governed by the ADEA," "reckless disregard" is almost automatic.

Accordingly, neither the "aware of conduct governed by the ADEA" nor a "reckless disregard" test begins to answer the question whether an employer has acted "willfully." The most logical test, and the one that best effectuates the plain language of the statute and Congressional intent, is the one requiring proof of specific intent to discriminate in violation of the ADEA (TWA Op. Br., pp. 30-37).[13]

III. THE PROCEDURAL ARGUMENTS RAISED BY ALPA ARE WITHOUT MERIT AND SHOULD NOT DETER A HOLDING THAT A UNION CAN BE MONETARILY LIABLE UNDER THE ADEA

In its brief as respondent, ALPA has raised a series of procedural arguments which, it claims, precludes this Court's consideration of a union's monetary liability under the ADEA. These arguments are meritless and should not deter this Court from holding that a union can be liable for monetary relief.

ALPA initially charges that TWA lacks "standing" to raise the question of a union's monetary liability since TWA is not one of the plaintiffs (ALPA Resp. Br., pp. 7-8).[14] In order to have standing, this Court requires that a petitioner have a " 'personal stake in the outcome of the controversy' " consist-

13 *See also amicus* briefs of U.S. Chamber of Commerce, pp. 6-10; and the Equal Employment Advisory Council, pp. 8-22.

14 It is significant to note that when ALPA opposed TWA's petition for certiorari on the question of a union's monetary liability under the ADEA, it never questioned TWA's standing. In any event, the issue is properly before this Court because the plaintiffs surely have standing on this issue and have raised it. That is all that is necessary. *See, e.g., Director, OWCP* v. *Perini North River Assocs.*, 459 U.S. 297, 302-05 (1983).

ing of a " 'distinct and palpable injury,' " *Larson* v. *Valente*, 456 U.S. 228, 238-39 (1982). Clearly, TWA has satisfied that threshold. Unless the decision below is reversed, TWA is stuck with total monetary liability under the ADEA even though both employer and union defendants were found liable. If that inequity and resulting financial cost to TWA is not a "distinct and palpable injury," then nothing is.[15]

ALPA also argues that TWA is barred from raising the question of union liability because TWA had never raised this issue prior to its petition for certiorari (ALPA Resp. Br., pp. 9-10). Of course, TWA had not previously raised the question because it was not an issue until *after* the Second Circuit had denied petitions for rehearing (A-40 to A-43) and released its "Errata Sheet" (A-37 to A-39) from which there was no appeal except to this Court.

Previously, the district court had granted TWA's motion for summary judgment, and therefore the question of union liability was never reached. At the appellate level, the Second

15 ALPA also raises the bizarre argument that the Second Circuit's finding of union liability was intended to apply only to the plaintiffs represented by the EEOC and not to the private plaintiffs (ALPA Resp. Br., p. 4). The basis for ALPA's argument is that the Second Circuit's decision used at one point the words "EEOC plaintiffs," and ALPA contends this means that the Second Circuit therefore did not intend to include the private plaintiffs when it imposed liability. Of course, ALPA gives no credible explanation why the Second Circuit would make such a distinction when it spends three pages of its decision detailing what it perceives as *ALPA*'s culpability here (A-31 to A-33). See also *Thurston* brief, p. 41 n.46. Clearly, ALPA's disingenuous footnote on this subject is inadequate as an explanation (ALPA Resp. Br., p. 4 n.2).

Equally bizarre is ALPA's argument that since the EEOC did not file a cross-petition for certiorari, the issue cannot now be raised because the EEOC "may not . . . seek to enlarge its rights on appeal." (ALPA Resp. Br., p. 8). Obviously, none of the plaintiffs had to file a cross-petition since their rights were not being enlarged beyond what TWA had raised as the issue in its initial petition. Accordingly, the cases which ALPA cites in support of its argument (ALPA Resp. Br., p. 8 n.5) are inapposite.

Circuit initially agreed that there should be joint monetary liability (A-34 to A-35). It was only after the Second Circuit completely reversed itself through the vehicle of its "Errata Sheet" (A-37 to A-39) that TWA had any reason to raise the issue.[16]

Finally, ALPA contends that TWA cannot raise the issue of union liability because that would be an attempt at seeking contribution which, ALPA says, is barred by this Court's decision in *Northwest Airlines, Inc.* v. *TWU*, 451 U.S. 77 (1981) (ALPA Resp. Br., pp. 10-16). However, the question of contribution is irrelevant to whether a *co-defendant* union can be held liable for monetary relief under the ADEA. See, *e.g.*, *id.* at 88-89 n.20 and the discussion in the *amicus* brief (p. 23 n.16) by the Equal Employment Advisory Council ("EEAC"). Indeed, even ALPA concedes in its respondent brief (p. 11) that "*Northwest Airlines* was a separate lawsuit for contribution" rather than a case involving co-defendants.

In the event of liability, this Court should therefore face the important substantive question which all the parties but ALPA have raised about union liability under the ADEA.[17] In that regard, it should carefully consider the fact that ALPA and the *amicus* AFL-CIO are unable to cite to one instance in the ADEA's legislative history which would suggest that Congress intended to exclude unions from monetary liability under the ADEA. Accord, *EEOC* v. *ALPA*, 489 F. Supp. 1003, 1009 n.5

16 The cases cited by ALPA in its brief (pp. 9-10) are therefore inapposite since they pertain to situations where an appellate court had not "considered" the question at all. Here, the Second Circuit actually examined the issue not just once but *twice*. That is certainly having the question "considered by the Court of Appeals," *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

17 See TWA Opening Brief, pp. 38-44; *Thurston* brief, pp. 33-43; EEOC brief, pp. 41-48. See also *amicus* brief of U.S. Chamber of Commerce, pp. 10-14; *amicus* brief of EEAC, pp. 22-26. As the *Thurston* and EEOC briefs readily show, it is not the case that "[p]laintiffs here have abandoned their claim for damages against ALPA" (ALPA Resp. Br., p. 13 n.14).

(D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981).

The purposes of the ADEA would obviously be emasculated by a wooden adherence to the remedies of the Fair Labor Standards Act ("FLSA") when the purposes of that statute differ markedly from the ADEA (TWA Op. Br., pp. 40-41).[18] It must be remembered that Section 7(b) of the ADEA expressly "grant[s] such legal or equitable relief as may be appropriate to effectuate the purposes of *this* Act," not the FLSA. Such statutory language, the policy reasons, the ADEA's legislative history, the provisions in other labor statutes and sound logic compel only one result: a union should be liable for monetary damages under the ADEA to the extent of its culpability.

Respectfully submitted,

HENRY J. OECHLER, JR.
30 Rockefeller Plaza
New York, N.Y. 10112
(212) 541-5800
Counsel of Record for
Trans World Airlines, Inc.

DONALD I STRAUBER
PETER N. HILLMAN
CHADBOURNE, PARKE, WHITESIDE
& WOLFF
Of Counsel

September 24, 1984

---

18 See also *Hodgson* v. *Sagner, Inc.*, 326 F. Supp. 371, 373-74 (D. Md. 1971), *aff'd sub nom. Hodgson* v. *Baltimore Regional Joint Bd.*, 462 F.2d 180 (4th Cir. 1972), where a co-defendant union was held liable for monetary damages under the Equal Pay Act, 29 U.S.C. § 206(d), which is part of the FLSA.

REPLY

BRIEF

Office-Supreme Court, U.S.
FILED
SEP 27 1984
ALEXANDER L. STEVAS,
CLERK

Nos. 83-997 and 83-1325

In the Supreme Court of the United States

OCTOBER TERM, 1984

TRANS WORLD AIRLINES, INC., PETITIONER

v.

HAROLD H. THURSTON, ET AL.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, PETITIONER

v.

HAROLD H. THURSTON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Cases: Page

Arnold's Hofbrau, Inc. v. *George Hyman Construction Co.*, 480 F.2d 1145 4

Bowen v. *United States Postal Service*, 459 U.S. 212 3

Bryant v. *Technical Research Co.*, 654 F.2d 1337 4

Davis v. *Combustion Engineering, Inc.*, No. 82-5471 (6th Cir. Aug. 16, 1984) 5

Director, Office of Workers' Compensation Programs v. *Perini North River Associates*, 459 U.S. 297 ..... 3, 4

Equal Employment Opportunity Commission v. *Prudential Federal Savings & Loan Association*, No. 82-2444 (10th Cir. Aug. 7, 1984) 5

Kirklighter v. *Nails by Jannee, Inc.*, 616 F.2d 734 4

Lafley v. *Northwest Airlines, Inc.*, 366 F. Supp. 763, aff'd, 567 F.2d 429 4

Langnes v. *Green*, 282 U.S. 531 4

Larson v. *Valente*, 456 U.S. 228 3

Northwest Airlines, Inc. v. *Transport Workers*, 451 U.S. 77 4

O'Bannon v. *Town Court Nursing Center*, 447 U.S. 773 ..... 3, 4

Warth v. *Seldin*, 422 U.S. 490 3

Whittlesey v. *Union Carbide Corp.*, No. 1142 (2d Cir. Aug. 22, 1984) 5

Statutes and rule:

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 3

29 U.S.C. 626(b) 5

Sup. Ct. R. 22.4 2

Miscellaneous:

12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* (2d ed. 1982) 4

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-997

TRANS WORLD AIRLINES, INC., PETITIONER

v.

HAROLD H. THURSTON, ET AL.

No. 83-1325

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, PETITIONER

v.

HAROLD H. THURSTON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

---

1. The Union, in its brief as respondent in No. 83-997, argues that this Court should not consider TWA's claim that the union is liable for damages

under the ADEA because EEOC and the private respondents have not cross-petitioned on that issue, and TWA has no right of contribution against the Union.[1]

a. This suit was brought by EEOC and the private respondents against both TWA and ALPA, seeking damages against them both. When the court of appeals reversed the district court's dismissal of that suit, it originally held that "appellants are entitled to recover back pay, an equitable remedy, against the union" (Pet. App. A34), and remanded the case to the district court with "directions to enter judgment for appellants against TWA and ALPA and to award to each plaintiff such amount as may be found due against each defendant in accordance with this opinion" (Pet. App. A35). On ALPA's petition for rehearing, the court of appeals amended this language (Pet. App. A38-A39), leaving TWA solely liable for all the damages found. This amendment clearly enhanced the consequences of TWA's liability beyond the exposure it had under the theory on which suit was originally brought and the original decision of the court of appeals. If TWA prevails in this Court, the district court on remand may apportion the total liability between ALPA and TWA; if TWA does not

[1] The petition for a writ of certiorari in No. 83-997 was granted on February 27, 1984; the cross petition (No. 83-1325) was not granted until April 2, 1984. In this unusual situation (see Sup. Ct. R. 22.4), the briefing schedule has been as follows: TWA filed its opening brief in No. 83-997 on May 17, 1984, and ALPA filed its opening brief in No. 83-1325 on May 31, 1984. We responded to these briefs in our main brief filed on July 6, 1984. On the same day, ALPA filed its main brief in response in No. 83-997, in which it for the first time presented its views on the union liability issue. Since we did not have the opportunity to address these views in our earlier filed brief, we do so here.

prevail, it is solely liable. As a practical matter, therefore, TWA has a significant financial interest in the question it has presented. This interest is, we submit, sufficient to permit TWA to raise the question in its petition for certiorari. See *Larson* v. *Valente*, 456 U.S. 228, 239 (1982); *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). It had no reason to urge it before the court of appeals altered its judgment on rehearing. *Bowen* v. *United States Postal Service*, 459 U.S. 212, 217-218 n.7 (1983).[2]

[2] It is also significant that both EEOC and the private plaintiffs, who clearly have an interest in this issue, support TWA's position on this question on the merits. Cf. *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, 459 U.S. 297, 304-305 (1983); *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773, 783-784 n.14 (1980).

The procedural posture of *Perini* is very similar to that here. The Director of the Office of Worker's Compensation Programs, U.S. Department of Labor, petitioned for review of the Second Circuit's decision that an injured employee of Perini was not entitled to compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* Perini challenged the Director's standing to raise the issue, asserting that he was not aggrieved by the court's ruling. However, this Court ruled that the presence of Churchill, the injured worker, as a party respondent and his filing of a brief in this Court urging reversal made the question of the Director's standing immaterial (459 U.S. at 304-305):

> The Director's petition, filed under 28 U.S.C. § 1254(1), brings Churchill before this Court, and there is no doubt that Churchill, as the injured employee, has a sufficient interest in this question to give him standing to urge our consideration of the merits of the Second Circuit decision.

Similarly, TWA's petition brought EEOC and the private plaintiffs before this Court as respondents, and these respondents have joined TWA in urging reversal of the Second Circuit's immunization of ALPA from monetary liability. Plain-

b. This is not a situation like *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77 (1981), in which, after the airline was found liable for discrimination against its female employees in *Laffey* v. *Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C.), aff'd, 567 F.2d 429 (D.C. Cir. 1973), the airline commenced a separate action for contribution. Here, *plaintiffs* sued both the airline and the union and demonstrated that they were responsible for the discrimination charged (Pet. App. A32-A33; compare *Northwest Airlines*, 451 U.S. at 81, n.5). This Court in *Northwest Airlines* assumed "that the plaintiffs in the *Laffey* litigation could have recovered from either the union or the employer," 451 U.S. at 88, but found that assumption an insufficient basis for providing the airline with a separate cause of action for contribution in the absence of any statutory or federal common law provision for such a separate remedy. 451 U.S. at 90-99. In contrast, here TWA has not

---

tiffs thus supply the requisite adversity to cure any standing problem. A "justiciable controversy is now before the Court." 459 U.S. at 305.

EEOC and the private plaintiffs are properly before this Court as respondents supporting petitioner on this issue; they may accordingly argue any issue comprehended within the questions presented by the petition in urging reversal of the judgment of the court of appeals. *Perini, supra*; *O'Bannon, supra*. There was accordingly no need for a cross-petition on this issue. In any event, the requirement of a cross-petition is a rule of practice and not jurisdictional. *Langnes* v. *Green*, 282 U.S. 531, 538 (1931); see *Bryant* v. *Technical Research Co.*, 654 F.2d 1337, 1341-1342 (9th Cir. 1981) (cross-appeal); *Kicklighter* v. *Nails by Jannee, Inc.*, 616 F.2d 734, 742-744 (5th Cir. 1980); *Arnold's Hofbrau, Inc.* v. *George Hyman Construction Co.*, 480 F.2d 1145, 1150 (D.C. Cir. 1973); see also 12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* ¶ 400.05-5 (2d ed. 1982).

instituted a separate suit, or even sought to bring an additional party defendant into the original suit.[3]

2. Since we filed our opening brief, three courts of appeals have concluded that, as we submit (Gov't Br. 43-48), the remedies available under the ADEA are broader than those under the FLSA. These courts emphasize that the ADEA authorizes the district court to grant "such legal or equitable relief as may be appropriate to effectuate the purposes of" the Act (29 U.S.C. 626(b)). *Whittlesey* v. *Union Carbide Corp.*, No. 1142 (2d Cir. Aug. 22, 1984), slip op. 5984-5985 (affirming the award of front pay under the ADEA where reinstatement is not feasible); *Davis* v. *Combustion Engineering, Inc.*, No. 82-5471 (6th Cir. Aug. 16, 1984), slip op. 11-12 (same); *Equal Employment Opportunity Commission* v. *Prudential Federal Savings & Loan Association*, No. 82-2444 (10th Cir. Aug. 7, 1984), slip op. 11-15 (same; contrasting narrower FLSA remedy).[4]

---

[3] We suggested in our opposition to TWA's petition for certiorari that "the proper parties to seek further review of this issue would be respondents, the ones who were injured by ALPA's discriminatory conduct" (Br. in Opp. 19). That argument urged a prudential consideration against granting certiorari when those most directly affected by the decision below did not seek further review. It did not, however, suggest that, having decided to review the case, the Court would not have jurisdiction to review the issue, which is properly in this case.

[4] These cases also reaffirm their Circuits' rejection of the specific intent interpretation of the "wilfullness" requirement for liability for liquidated damages. *Davis*, slip op. 8-9; *Prudential*, slip op. 17-20; cf. *Whittlesey*, slip op. 5983 (violation not willful where "there was excusable uncertainty" over coverage of employees involved). See our opening brief (at 39).

For the foregoing reasons and those discussed in our principal brief, the judgment of the court of appeals should be reversed insofar as it holds ALPA not liable for damages and should be affirmed in all other respects.

REX E. LEE
Solicitor General

SEPTEMBER 1984

★ U. S. GOVERNMENT PRINTING OFFICE, 1984 421-021 10259

REPLY

BRIEF

Office-Supreme Court, U.S.
F I L E D
OCT 2 1984
ALEXANDER L. STEVAS,
CLERK

Nos. 83-997, 83-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

Petitioner in No. 83-1325
Respondent in No. 83-997

MICHAEL E. ABRAM
330 West 42nd Street
New York, New York 10036
(212) 563-4100
Counsel of Record for Air Line Pilots Association, International

JAY P. LEVY-WARREN
ANN E. O'SHEA
COHEN, WEISS and SIMON
Of Counsel

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	2
ARGUMENT	2
I. UNDER § 4(f)(1) TWA COULD RETIRE PILOTS AT AGE 60	2
II. NEITHER THE EEOC NOR PLAINTIFFS HAVE ESTABLISHED A BASIS TO ALLOW TWA TO SHIFT ITS DAMAGES TO ALPA	6
A. The EEOC and Private Plaintiffs Correctly Asked This Court to Reject TWA's Claim to Shift Damages	6
B. Neither the EEOC Nor Private Plaintiffs Provide Convincing Reasons to Reverse the Second Circuit on Union Damages	13
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

	Page
Ambush Enterprises v. *Time Inc.*, 612 F.2d 604 (2d Cir. 1979), *cert. denied*, 448 U.S. 914 (1980)	6
Criswell v. *Western Air Lines, Inc.*, 709 F.2d 544 (9th Cir. 1983), *cert. granted*, 52 U.S.L.W. —— (U.S. Oct. 1, 1984) (No. 83-1543)	3
Director, Office of Workers Compensation Programs v. *Perini North River Associates*, 459 U.S. 297, 103 S.Ct. 634 (1983)	10, 12
Donovan v. *Burger King Corp.*, 675 F.2d 516 (2d Cir. 1982)	7
EEOC v. *CBS, Inc.*, 35 Fair Empl. Prac. Cas. (BNA) 1127 (2d Cir. 1984)	11
EEOC v. *Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984)	11
EEOC v. *Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir. 1983)	17
EEOC v. *Wyoming*, —— U.S. ——, 103 S.Ct. 1054 (1983)	5, 6, 17
Geller v. *Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981)	17
General Building Contractors Association, Inc. v. *Pennsylvania*, 458 U.S. 375 (1982)	18
General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976)	8
Hodgson v. *Sagner, Inc.*, 326 F.Supp. 371 (D.Md. 1971), *aff'd sub nom. Hodgson* v. *Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972)	15, 16
Lorillard v. *Pons*, 434 U.S. 575 (1978)	14, 15, 16
Mahoney v. *Trabucco*, 735 F.2d 35 (1st Cir. 1984)	7
Marshall v. *Baptist Hospital, Inc.*, 668 F.2d 234 (6th Cir. 1981)	18
Mercluck v. *NCR Corp.*, 546 F.2d 682 (6th Cir. 1976), *vacated and remanded*, 435 U.S. 911 (1978)	14
Muller Optical Co. v. *EEOC*, 35 Fair Empl. Prac. Cas. (BNA) 1147 (6th Cir. 1984)	11

TABLE OF AUTHORITIES—Continued

	Page
Northwest Airlines, Inc. v. *Transport Workers Union*, 451 U.S. 77 (1981)	9, 10, 15, 16
O'Bannon v. *Town Court Nursing Center*, 447 U.S. 773 (1980)	10
Pittston Stevedoring Corp. v. *Dellaventura*, 544 F.2d 35 (2d Cir. 1976), *aff'd sub nom., Northeast Marine Terminal Co.* v. *International Terminal Operating Co.*, 432 U.S. 249 (1977)	8
Pullman-Standard v. *Swint*, 456 U.S. 273, 102 S.Ct. 1781 (1982)	19
Reed v. *County Commissioners of Delaware County*, 277 U.S. 376 (1928)	12
Regan v. *Wald*, —— U.S. ——, 104 S.Ct. 3026 (1984)	3-4
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944)	8
Southeastern Community College v. *Davis*, 442 U.S. 397 (1979)	8
United States v. *Lorenzetti*, —— U.S. ——, 104 S.Ct. 2284 (1984)	3
United States v. *Reliable Transfer Co.*, 421 U.S. 397 (1975)	10, 11
Whittlesey v. *Union Carbide Corp.*, 35 Fair Empl. Prac. Cas. (BNA) 1089 (2d Cir. 1984)	16

STATUTES

Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634	
Section 4, 29 U.S.C. § 623	13, 14, 15
Section 4(a), 29 U.S.C. § 623(a)	6, 17
Section 4(f)(1), 29 U.S.C. § 623(f)(1)	2, 3, 4, 5 6, 7
Section 4(f)(2), 29 U.S.C. § 623(f)(2)	5
Section 7(b), 29 U.S.C. § 626(b)	12, 13, 14, 15
Section 7(c), 29 U.S.C. § 626(c)	14, 15, 20
Equal Pay Act of 1963, 29 U.S.C. § 206(d)	
Section 6(d)(1), 29 U.S.C. § 206(d)(1)	17
Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219	
Section 3(a), 29 U.S.C. § 203(a)	13
Section 3(d), 29 U.S.C. § 203(d)	13, 14

TABLE OF AUTHORITIES—Continued

	Page
Section 6, 29 U.S.C. § 206	13
Section 6(d)(2), 29 U.S.C. § 206(d)(2)	14, 15
Section 7, 29 U.S.C. § 207	13
Section 15, 29 U.S.C. § 215	13
Section 15(a)(2), 29 U.S.C. § 215(a)(2)	14, 15, 19
Section 15(a)(3), 29 U.S.C. § 215(a)(3)	14, 19
Section 16(b), 29 U.S.C. § 216(b)	13, 14, 15, 20
Section 16(c), 29 U.S.C. § 216(c)	13, 20
Section 17, 29 U.S.C. § 217	14, 20
Judiciary and Judicial Procedure Act	
28 U.S.C. § 451	12
28 U.S.C. § 1337	12
28 U.S.C. § 1343	12
28 U.S.C. § 1345	12
Portal-To-Portal Act of 1947, 29 U.S.C. §§ 251-262	
Section 10, 29 U.S.C. § 259	17, 18
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17	
Section 706(g), 42 U.S.C. § 2000e-5(g)	16, 17
Section 703(h), 42 U.S.C. § 2000e-2(h)	19
RULES AND REGULATIONS	
Supreme Court Rules	
Rule 19.5	9, 10
Rule 19.6	9, 10
29 C.F.R. § 860.102(d)	5
29 C.F.R. § 1625.6	5
LEGISLATIVE SOURCES	
H.R. Rep. No. 527 (Pt. 1), 95th Cong., 1st Sess. 12 (1977)	5, 6
H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 13-14, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 528	6
S. Rep. No. 493, 95th Cong., 1st Sess. 11 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 504	5

TABLE OF AUTHORITIES—Continued

	Page
S. Rep. No. 723, 90th Cong., 1st Sess. 10 (1976)	18
Age Discrimination in Employment: Hearings on H.R. 3651, 3768, 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess. (1967)	17, 18, 19
Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. (1967)	17, 18, 19
123 Cong. Rec. 34,296 (1977)	6
Pub. L. No. 95-151, 91 Stat. 1245 (1977)	13-14
Pub. L. No. 95-256, 92 Stat. 189 (1978)	4
46 Fed. Reg. 47,724 (1981)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-997, 83-1325

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

Petitioner in No. 83-1325
Respondent in No. 83-997

PRELIMINARY STATEMENT

Air Line Pilots Association, International ("ALPA") submits this reply brief as petitioner in No. 83-1325 to respond to arguments by the Equal Employment Opportunity Commission ("EEOC") and private plaintiffs Thurston, Clark and Parkhill ("plaintiffs") as to the application of § 4(f)(1) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(f)(1). As EEOC and plaintiffs also argued in favor of the claim by petitioner Trans World Airlines, Inc. ("TWA") to shift damages to ALPA in their briefs as respondents in No. 83-997, ALPA responds to these arguments to the extent they were not previously advanced by TWA, without conceding that these parties may properly address this issue. *See, infra*, at 8-10.[1]

ARGUMENT

I. UNDER § 4(f)(1) TWA COULD RETIRE PILOTS AT AGE 60.

Congress authorized mandatory retirement in § 4(f)(1) of the ADEA, which permits an employer "to take any action otherwise prohibited" by the ADEA (except retaliation) where age is a BFOQ. 29 U.S.C. § 623(f)(1). In the face of plain language, contemporaneous administrative interpretation, and unmistakable legislative history, the EEOC argues that the phrase "any action otherwise prohibited" only describes actions which are "'reasonably necessary' to the demands of the job," so that retirement is not an action permitted by § 4(f)(1).

[1] ALPA's opening brief as petitioner in No. 83-1325 is referred to as "ALPA Pet. Br." ALPA's brief as respondent in No. 83-997 is "ALPA Resp. Br." The EEOC's and the private plaintiffs' briefs in opposition to certiorari are referred to respectively as "EEOC Br. in Opp." and "Pl. Br. in Opp." The EEOC's brief as respondent is "EEOC Br." Private plaintiffs' brief as respondents is "Pl. Br." The EEOC's recent "Reply Memorandum" in No. 83-997 is "EEOC Reply Mem."

EEOC Br. at 28-29. Plaintiffs and the EEOC further assert that forced retirement from a BFOQ job is illegal because it applies the BFOQ to other jobs. Pl. Br. at 22-23; EEOC Br. at 26-27. We respectfully submit that these arguments are without merit.

1. Section § 4(f)(1) presents two distinct questions. The first is *whether* a particular age is a BFOQ "reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). The phrase "reasonably necessary" is uniformly understood to be one element in deciding this issue. *See, e.g., Criswell* v. *Western Air Lines, Inc.*, 709 F.2d 544, 550 (9th Cir. 1983), *cert. granted*, —— U.S.L.W. —— (U.S. Oct. 1, 1984) (No. 83-1545). The second question is *what* action may be taken by an employer when the employee reaches the BFOQ age. Section 4(f)(1) states that an employer may then take "any action otherwise prohibited" by the ADEA. While the BFOQ may not be established unless it is "reasonably necessary," there is no such limit on the action authorized where age is a BFOQ. The EEOC's strained reading inverts the words on the statute, and reduces "any action otherwise prohibited" to mean the sole action "'reasonably necessary' to the demands of the job": that is, an employer may only remove an employee from a BFOQ job and then take any additional action *not* prohibited by § 4(a) of the ADEA. The Court has consistently declined such invitations to judicial legislation. *See* ALPA Pet. Br. at 19; *see also United States* v. *Lovasetti*, —— U.S. ——, 104 S.Ct. 2284, 2291 (1984).

There is no dispute that TWA captains who reach age 60 are subject to a BFOQ. Under § 4(f)(1), TWA may then take the action of requiring a captain's retirement. "[I]n light of the sweeping statutory language, [the EEOC's] argument borders on the frivolous." *Regan* v.

Wald, —— U.S. ——, 104 S.Ct. 3026, 3034 n.16 (1984) (construing the phrase "any . . . transactions").

2. While ALPA has demonstrated Congress' unmistakable intent to allow mandatory retirement under § 4(f)(1), ALPA Pet. Br. at 9-11, the EEOC regards that legislative history both as "incongruous" and as irrelevant to the issue of "age-based disparities in job transfer rights." EEOC Br. at 28-29. There is nothing "incongruous" in Congressional selectivity in adopting or expanding remedial legislation.[5] Moreover, the issue here is not age discrimination in transfer rights; the seniority provisions of the Working Agreement are not age-based. EEOC Br. at 7-8, 25, n.31; Pl. Br. at 21; TWA Br. at 28, n.35; *see* A-26. Rather, the issue presented is whether captains and first officers may be retired and consequently excluded from the seniority system at age 60.[6] As to this issue, Congress plainly and unmistakably approved "mandatory retirement" as one of the actions permitted by § 4(f)(1) even if that action otherwise violates the ADEA.[7] Plainly, the EEOC may not seek

[5] In the 1978 amendments Congress retained an age ceiling (70), delayed the new upper age limit protection for tenured faculty and persons covered by collective bargaining agreements, and restricted the protection for executives covered by minimum pension terms. Pub. L. No. 95-256, § 2(b), § 3(a), 92 Stat. 189, 189-90 (1978). These actions were no less "incongruous" in the context of Congress's overall actions than was Congress's wish to protect existing practices where age is a BFOQ.

[6] *See* A-26 ("the employment practice at issue in this lawsuit [is] the severing of age 60 captains from the company"); EEOC Br. at 15 (the issue "is the forced retirement of captains and first officers at age 60, and their resulting exclusion from the seniority system"); Pl. Br. at 16-17 (attacking TWA's system of "mandatory retirement, severance of seniority rights and refusal to transfer because of age").

[7] The proposed Senate amendment to § 4(f)(1) in 1977, specifying that "any action" included "the establishment of a mandatory retirement age less than [age 70] . . . where age is a [BFOQ]," S. Rep. No. 493, 95th Cong., 1st Sess. 11, 24 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 504, 514; the 1977 House Committee Report, stating that the ADEA amendments were "not intended [to] prohibit mandatory retirement or other employment practices where age is a [BFOQ]", H.R. Rep. No. 527 (Pt. 1), 95th Cong., 1st Sess. 12 (1977); and 1978 legislative debates, ALPA Pet. Br. at 10-11, all expressed approval of mandatory retirement at an age which is a BFOQ.

judicial deference to its interpretation of § 4(f)(1) on the grounds that "Congress never specifically addressed the issue." EEOC Br. at 29-30.

When Congress enacted the ADEA in 1967, it permitted employers and unions to continue the use of existing age-based employment practices in response to disqualification by a BFOQ. Congress did *not* require the transfer or retraining of employees disqualified by age.[8] As the Court emphasized in reviewing the EEOC's challenge to Wyoming's mandatory retirement of game wardens in *EEOC* v. *Wyoming*, —— U.S. ——, 103 S.Ct. 1054 (1983), employers "remain free under the ADEA to continue to do *precisely what they are doing now*, if they can demonstrate that age is a [BFOQ] for the job. . . ." 103 S.Ct. at 1062 (emphasis in original). Indeed, in 1968, the Department of Labor ("DOL") issued interpretive regulations which acknowledged that § 4(f)(1) authorized the existing practice of compulsory retirement of airline pilots who are subject to the FAA's Age 60 Rule.[9] When Congress amended § 4(f)(2) of the ADEA in 1978 to prohibit mandatory retirement under employee benefit plans and seniority systems, it did not

[8] *See* ALPA Pet. Br. at 13. The EEOC and plaintiffs do not argue that Congress was unaware of the obvious variety of employment practices available when employees are not able to keep a job for various reasons. *Id.* at 14.

[9] 29 C.F.R. § 860.102(d), superseded in 1981 by 29 C.F.R. § 1625.6. *See* 46 Fed. Reg. 47724 (1981).

change § 4(f)(1), but rather confirmed that under present law, once a valid BFOQ is established, "an employer may lawfully require mandatory retirement at that specified age." H.R. Conf. Rep. No. 950, 95th Cong., 1st Sess. 7 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 528, 529; 123 Cong. Rec. 34,296 (1977). *See* ALPA Pet. Br. at 11.

In short, under § 4(f)(1), employers remain free to do what they had been doing prior to 1967, and were continuing to do in 1977, in retiring employees disqualified by a BFOQ. This is precisely the assurance given to this Court by the EEOC in *EEOC* v. *Wyoming*, where the agency argued that "[i]f age is a 'bona fide occupational qualification,' a[n] employer is free to impose a mandatory retirement age. . . ."[7] Neither the EEOC nor plaintiffs square their present reading of § 4(f)(1) with the 1978 Senate amendment, House Report, Conference Committee Report and floor debates—all of which confirm that mandatory retirement is precisely an action authorized by § 4(f)(1), without *any* suggestion that such action may be taken only if it is not otherwise prohibited by § 4(a) of the ADEA. ALPA Pet. Br. at 9-14.

3. Contrary to respondents' contention, mandatory retirement where age is a BFOQ does not "apply" the BFOQ to other jobs. *See* EEOC Br. at 27; Pl. Br. at 23-24. If an airline employed crew members only in positions which are subject to a BFOQ, it would still have to decide what action to take concerning captains who reach age 60: it could either place these captains on furlough pending a possible change in FAA regulations or acquisition of aircraft requiring flight engineers, or it could retire them. Either decision applies to the position subject to the BFOQ.[8] By relying on cases addressing the "job specific" nature of the BFOQ, the EEOC once again confuses the issue of establishing a BFOQ with the action which may be taken on the basis of a BFOQ. As the court observed in *Mahoney* v. *Trabucco*, 735 F.2d 35, 38 (1st Cir. 1984), a recent "job specific" BFOQ decision, "the whole idea of a BFOQ is to carve out a limited occupational field where an employer may enforce a retirement age requirement, free from the duty of making individual judgments, provided that the . . . [BFOQ is] established." However narrowly the occupational field subject to a BFOQ may be defined, § 4(f)(1) plainly authorizes mandatory retirement where age is established to be a BFOQ for a particular occupational category.

4. The EEOC requests that the Court defer to its litigation position and to DOL "opinion letters," which are contrary to the DOL's 1968 interpretive bulletin expressly acknowledging compulsory retirement as an action permitted by § 4(f)(1) and which were "effectively rescind[ed]" by the EEOC, 46 Fed. Reg. 47,724 (1981). This argument should be rejected.[9] Deference to agency interpretations "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier pronouncements, and all those

---

[7] Brief of Appellant EEOC at 13-14, *EEOC* v. *Wyoming*, 103 S.Ct. 1054 (1984); *see* 103 S.Ct. at 1071 (Burger, C.J., dissenting).

[8] There is no question here about the right of age 60 former captains to apply for the flight engineer job or any other TWA position on the same basis as any other applicant. Plaintiffs do not seek jobs as applicants; they seek to use accrued seniority to secure flight engineer positions *after* they turn 60. Whether they can do so is entirely a function of the scope of the actions that the employer may take when a captain turns 60 and in no way "applies" the BFOQ to any other position.

[9] *See Dawson* v. *Burger King Corp.*, 675 F.2d 516, 522 (2d Cir. 1982) (no deference to agency litigation position). Moreover, the DOL opinion letters are ambiguous: they either require equal consideration of captains "approaching age 60," with which TWA complies, or prohibit mandatory retirement upon disqualification by a BFOQ, which is the issue in this case.

factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). *See General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-43 (1976). Where, as here, the question involves statutory construction dependent on the language of the act as well as its legislative history, deference to agency interpretations is not warranted,[10] especially if it is contrary to the plainly expressed intent of Congress.[11]

II. NEITHER THE EEOC NOR PLAINTIFFS HAVE ESTABLISHED A BASIS TO ALLOW TWA TO SHIFT ITS DAMAGES TO ALPA

A. The EEOC and Private Plaintiffs Correctly Asked This Court to Reject TWA's Claim to Shift Damages

The EEOC and private plaintiffs opposed TWA's petition for certiorari on all issues, including its effort to shift damages to ALPA. The EEOC stated that TWA's claim was "analogous to a claim for contribution" and "should be rejected." EEOC Br. in Opp. at 19. The EEOC also asserted that "ADEA defendants are jointly and severally liable for violating the Act" (rather than subject to apportionment of damages) and, as a result, the EEOC claimants "will obtain full relief from TWA." *Id.* at 19 n.16.[12]

---

[10] *See, e.g., Southeastern Community College* v. *Davis*, 442 U.S. 397, 411-12 (1979); *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co.* v. *International Terminal Operating Co.*, 432 U.S. 249 (1977).

[11] *See Ambush Enterprises* v. *Time Inc.*, 612 F.2d 604, 610 (2d Cir. 1979), *cert. denied*, 446 U.S. 914 (1980).

[12] Private plaintiffs agreed that any liability is joint and several, that they have no obligation to pursue a claim for damages from ALPA, that they "will now receive full relief from TWA," that TWA's claim is not properly before this Court, and that TWA was in effect seeking contribution without having raised this claim in its pleadings. Pl. Br. in Opp. at 10 & n.14, 11 & n.16.

The EEOC, in an unusual "reply memorandum," has reversed its position and now argues (1) that TWA has a right to apportionment of damages (meaning that the EEOC will not collect all of its money from the employer) and (2) that TWA's claim is not in the nature of a claim for contribution. EEOC Reply Mem. at 2-3, 4-5. As to proposition (1), the EEOC cites no authority and stands mute as to the contrary authorities on which it relied in opposing certiorari. EEOC Br. in Opp. at 19, n.16. As to proposition (2), the EEOC abandons its prior reliance on *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77 (1981), EEOC Br. in Opp. at 19, and instead attempts to distinguish *Northwest Airlines* on the basis of procedural differences between Northwest's and TWA's claims. EEOC Reply Mem. at 4-5. Yet, the question of a right to contribution as asserted by TWA is entirely a function of whether Congress has created that statutory right and, as such, does not depend on the procedural context in which the right to shift damages is asserted. ALPA Resp. Br. at 14.[13]

The EEOC also argues that the private plaintiffs and the agency may now pursue *their* claims for damages against ALPA in this Court. EEOC Reply Mem. at 3-4, n.2. This assertion squarely presents a significant issue in the administration of the Court's docket: May a respondent seek to reverse a partially adverse judgment where it opposed the petition for certiorari, informing the Court that it was satisfied with the judgment, and did not file either a timely cross-petition under Supreme Court Rule

---

[13] Of course, the EEOC here *did sue* ALPA, and assuming that the ADEA authorized recovery of damages against ALPA, the agency could have pursued that claim. In that sense, *Northwest Airlines* and *TWA* are different cases. However, the EEOC stopped pursuing its claim, as was its right, after the Second Circuit judgment, and that is why, even procedurally, this case and *Northwest Airlines* are now in the same posture.

19.5 or a timely paper in support of the petition for certiorari under Rule 19.6.

The position advocated by the EEOC is contrary to the holding of *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401, n.2 (1975), and related cases that "absent a cross-petition for certiorari, the respondent may not now challenge the judgment of the Court of Appeals to enlarge its rights thereunder," and would negate Rules 19.5 and 19.6. *See* ALPA Resp. Br. at 8 n.5. Accordingly, Respondents EEOC and plaintiffs have no right to enlarge a judgment from which they did not seek review in accordance with this Court's Rules.[9] Since TWA has no right to shift its damages to ALPA, ALPA Resp. Br. at 8, the judgment on this aspect of the case should remain undisturbed.

---

[9] In *Director, Office of Workers Compensation Programs* v. *Perini North River Associates*, 459 U.S. 297, 103 S.Ct. 634 (1983), the Court held that a respondent, who had filed a timely brief in support of a petition for certiorari in accordance with Supreme Court Rule 19.6 and a brief on the merits in support of the position taken by the petitioner, could seek reversal of an adverse judgment. 103 S.Ct. at 640-41. The significance of *Perini*, therefore, is that a timely Rule 19.6 filing is, for these purposes, equivalent to a timely petition or cross-petition for certiorari. In *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773, 780-84 n.14 (1980), the Court reasoned that the HEW Secretary, automatically joined as a respondent under former Rule 21(4), could "[i]n that capacity seek reversal of the judgment of the Court of Appeals." The Court obviously meant that the Secretary could do so in the capacity of a respondent who "support[s] the position of the petitioner" within this Court's Rules (otherwise, of course, no "respondent" would ever have to file a petition to secure a reversal). Indeed, the Court held that the Secretary of HEW could not secure review of the propriety of the payment order because he "did not file a petition for certiorari." 447 U.S. 780 n.14. Moreover, the issue pursued by TWA (its effort to *shift* damages to ALPA) is not the same issue as EEOC's claim (to secure damages from ALPA), *see Northwest Airlines, Inc.*, 451 U.S. at 88 n.20, and EEOC and plaintiffs *opposed* the petition for certiorari in papers filed beyond the mandatory 30-day limit of Rule 19.6.

The recent decision of the Second Circuit in *EEOC* v. *CBS, Inc.*, 35 Fair Empl. Prac. Cas. (BNA) 1127 (2d Cir. 1984), poses an additional obstacle to review. The court in *CBS* held that the transfer of ADEA enforcement authority from the Department of Labor to the EEOC was unconstitutional.[10] As the court below in the present case held that "ALPA is liable under 29 U.S.C. § 623(c)(3) to the EEOC plaintiffs who were damaged by its conduct" A-33,[10] any decision by this Court con-

---

[10] *But see Muller Optical Co.* v. *EEOC*, 35 Fair Empl. Prac. Cas. (BNA) 1147 (6th Cir. 1984); *EEOC* v. *Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984).

[10] The judgment below "directed that each plaintiff be awarded such relief as he was entitled to against each defendant *in accordance with this opinion*, after such evidentiary hearing as may be necessary for that purpose." A-35, 39 (emphasis added). The opinion expressly limited ALPA liability "under 29 U.S.C. § 623(c)(3) to the *EEOC plaintiffs who were damaged by its conduct*." A-33 (emphasis added). Plaintiffs have not sought review of this adverse judgment in this Court. *See, e.g., United States* v. *Reliable Transfer Co.*, 421 U.S. at 401 n.2.

All three private plaintiffs and four of the EEOC claimants retired prior to "ALPA's actions in signing the post-1978 Working Agreements [executed in July, 1979 (J.A. 147, 337-38)] and in causing TWA to implement other restrictions on the downbidding older captains. . . ." A-33 n.19. The EEOC admits that these additional restrictions were not adopted until 1980. EEOC Br. at 9. These seven claimants (inculding all private plaintiffs) were not damaged by any conduct of ALPA, *see* ALPA Resp. Br. at 4 n.4.

Plaintiffs and the EEOC argue that ALPA monetary liability to captains retired prior to July, 1979, should be based on the *ALPA* v. *TWA* lawsuit filed August 10, 1978; ALPA contract proposals made in August, 1978; and meetings between ALPA and TWA in the summer of 1978. EEOC Br. at 56; Pl. Br. at 11-13. These assertions are unsupported by the record.

- The Second Circuit expressly declined to consider whether ALPA's filing *ALPA* v. *TWA* violated the ADEA. A-33 n.19.
- ALPA's August 24, 1978, contract proposals, made under § 6 of the RLA (J.A. 244, ¶ 14), were immediately rejected by TWA as premature (*id.*, ¶ 15); ALPA refused to discuss these pro-

cerning union liability would be purely advisory under governing Second Circuit decisional law.[17]

---

posals except under § 6 procedures (J.A. 245, ¶ 16); when ALPA made timely proposals to amend the 1977 agreement, items relating to working past age 60 were *not* included. J.A. 158-161. Indeed, the Second Circuit affirmed summary judgment in *ALPA* v. *TWA* on the grounds, *inter alia*, that ALPA "failed to negotiate over TWA's retirement policy for flight engineers" in 1979 and 1982. A-15.

- The Second Circuit determined that ALPA *unsuccessfully* opposed TWA's change in policy and did *not* find that ALPA played any role in TWA's shift between the July, 1978, Crombie letter and the August, 1978, bulletin. Rather, the Court found that "TWA unilaterally issued" the August, 1978, bulletin. A-9. TWA does not dispute this. The EEOC's explanation is that Frankum, who replaced Crombie in developing age-60 policy, "did not agree with Crombie's July 19th letter"; "disavowed [that] letter and . . . proceeded from there"; and "caused TWA to issue" the August bulletin. EEOC Br. at 6. Frankum did not receive any response from or discuss the matter with ALPA. Frankum Tr. at 206; J.A. 100 5A. Another TWA official stated that ALPA "had no impact at all" on the formulation of the August, 1978, bulletin. J.A. 1050-52. The EEOC's references to meetings between ALPA and TWA in the summer of 1978 are inapposite: the statements made at J.A. 1041-1049 were disavowed during cross-examination, Hilly Tr. 2/10/82 at 138; ALPA's opposition, on BFOQ grounds, to service past age 60 by any flight engineer (J.A. 1050-56), was known to TWA *prior to* Crombie's letter (J.A. 1055).

[17] The EEOC alleged jurisdiction under 28 U.S.C. §§ 451, 1337, 1343 and 1345. J.A. 92. As the EEOC is not "authorized to sue" by a constitutional "Act of Congress" to enforce the ADEA, 28 U.S.C. §§ 451 and 1345 are inapplicable. *See Reed* v. *County Commissioners of Delaware County*, 277 U.S. 376 (1928). As § 7(b) of the ADEA specifically vests enforcement authority in the Department of Labor, not the EEOC, the general jurisdictional grants in 28 U.S.C. §§ 1337 and 1343 add nothing to the power of the federal district courts to entertain an ADEA action by the EEOC. Moreover, absent authority to enforce the ADEA, the EEOC would lack standing to present those issues to the Court. *See generally, Director, Office of Workers Compensation Programs* v. *Perini North River Associates*, 459 U.S. at 304-305.

B. Neither the EEOC Nor Private Plaintiffs Provide Convincing Reasons to Reverse the Second Circuit on Union Damages

1. The EEOC and private plaintiffs seek to obtain legal relief against unions which violate the ADEA. Yet the EEOC concedes that the enforcement mechanism of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, was explicitly incorporated in the ADEA, and that the latter statute "is to be enforced under the FLSA. . . ." EEOC Br. at 31 n.35. The EEOC further admits that § 16(b) of the FLSA, as incorporated in the ADEA, only "authorizes employees to sue their *employer* for back pay and liquidated damages." EEOC Br. at 43 (emphasis added). As § 16(c) provides a representative suit to obtain only the relief provided under § 16(b), ALPA Resp. Br. at 22-23, the government also may obtain legal relief only from an "employer." The EEOC's and plaintiffs' reliance on the general "legal or equitable relief" language in § 7(b) of the ADEA is misplaced, as these terms do not provide additional legal remedies for "amounts owing" beyond what is authorized by incorporated FLSA remedies. *See* ALPA Br. at 31-32.

Plaintiffs seek to justify legal relief against unions by reading language in § 7(b), which deems a violation of § 4 of the ADEA to be a violation of § 15 of the FLSA, as also intended to make violations of § 15 by "any person" to be "employer violations of FLSA Sections 6 and 7 . . . actionable under FLSA Section 16(b) . . . ." Pl. Br. at 39. This construction of § 7(b) of the ADEA and §§ 15 and 16 of the FLSA is contrary to the terms of both statutes. While § 15 prohibits violations by "any person," defined in FLSA § 3(a) to cover labor organizations, § 16(b) only provides for recovery of "unpaid minimum wages or . . . unpaid overtime compensation" and liquidated damages from an "employer," expressly defined in FLSA § 3(d) to exclude labor organizations.[18]

---

[18] Congress amended § 16(b) in 1977 to provide legal and equitable remedies against "any employer" which retaliates, Pub. L. No.

By deeming a § 4 violation to be a § 15 violation, and by deeming "amounts owing" to be "unpaid minimum wages and overtime compensation" in § 7(b) of the ADEA, Congress provided that an FLSA § 3(d) "employer" would be responsible for payment of "amounts owing," and both employers and labor organizations would be subject to such injunctive relief as is available in government enforcement actions under § 17 of the FLSA.

2. The EEOC and plaintiffs also argue that § 17 of the FLSA and § 7(c)(1) of the ADEA provide an *equitable* back pay award against unions. Yet, § 17 has been construed to provide monetary relief against employers, not unions. *See* ALPA Resp. Br. at 26. Moreover, the decision in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), that the ADEA provides a statutory right to a jury trial was based on this Court's determination that the *exclusive* remedy for "amounts owing" in a private ADEA action is the "legal relief" provided in § 16(b) of the FLSA, as incorporated in the ADEA, rather than the "equitable relief" provided in § 17 of the ADEA.[19]

95-151, 91 Stat. 1245 (1977), even though § 15(a)(3) prohibits retaliation by "any person," and prior decisions had construed the "employer" language in § 16(b) not to apply to labor organizations which violated § 6(d)(2), § 15(a)(2) or § 15(a)(3) of the FLSA. *See* ALPA Br. at 25-26.

[19] In *Lorillard*, this Court found that Congress had adopted decisional law construing § 16(b) of the FLSA to confer a right to a jury trial: (1) by incorporating § 16(b) in the ADEA, 434 U.S. at 580-81 & n.7; and (2) by directing that actions for wages lost as a result of an ADEA violation are to be treated as actions for "unpaid minimum wages or overtime compensation" under the FLSA, 434 U.S. at 582. Even though § 17 of the FLSA expressly authorized an equitable back pay remedy, 434 U.S. at 580 n.7, and § 17 equitable relief was available "in any action" under the ADEA, *id.* at 581, this Court determined that decisional law construing § 17 not to provide for jury trials did *not* apply to a private employee action for reinstatement and unpaid wages. *Id.* at 580 n.7. *See Morelock* v. *NCR Corp.*, 546 F.2d 682 (6th Cir. 1976), *vacated and remanded*, 435 U.S. 911 (1978).

The argument that § 7(c)(1) of the ADEA authorizes appropriate "legal or equitable relief" in addition to the remedies provided in § 7(b) of the ADEA is similarly foreclosed by *Lorillard*. The terms "legal or equitable relief" do not provide a basis to determine whether the ADEA provides a right to a jury trial, since a private action for unpaid wages may equally be characterized as seeking "legal relief" or an "equitable" back pay award. The only reading of § 7(c)(1) consistent with *Lorillard* is that it creates a private cause of action to obtain the remedies provided in § 7(b) of the ADEA. *See* ALPA Resp. Br. at 17 n.20.

While Congress expressly modified FLSA procedures and remedies in § 7(c)(1) to provide that "any person aggrieved" (in contrast to "one or more employees," 29 U.S.C. § 216(b)) may bring an action, and in § 7(b) to authorize equitable remedies "in any action," there is no provision in the ADEA which deems "any person" who violates § 4 to be an FLSA "employer," or otherwise provides a remedy against labor organizations for "amounts owing" as a result of a violation of the ADEA. As this Court emphasized in *Lorillard*:

> "The selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA."

434 U.S. at 582. Whatever power a court may have to order equitable monetary relief under § 7(b) where a union interferes with the enforcement of the Act,[20] or

---

[20] *See Hodgson* v. *Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), *aff'd sub nom. Hodgson* v. *Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972). The EEOC's suggestion that *Sagner* "held that unions are subject to back pay liability as an equitable remedy when they violate Section 6(d)(2) of the [Equal Pay Act]," EEOC Br. at 46-47 n.32, is far different from its analysis of § 17 and *Sagner* in *Northwest Airlines*, where it argued that remedies for union violations of § 6(d)(2) and § 15(a)(2) of the FLSA are

as a substitute for the equitable remedy of reinstatement, *see, e.g., Whittlesey* v. *Union Carbide Corp.*, 35 Fair Empl. Prac. Cas. (BNA) 1089, 1091-92 (2d Cir. 1984), there is no statutory basis to supplement the exclusive remedies that Congress provided to recover "amounts owing" for ADEA violations.[15] *Cf. Northwest Airlines*, 451 U.S. at 93-94.

2. The EEOC argues that Congress merely incorporated the language of FLSA §§ 16 and 17 into the ADEA, but not the policy choices embodied in the remedial scheme of the FLSA, because the elimination of an unfair method of competition is not an express "purpose" of the ADEA. EEOC Br. at 46. This distinction in "purpose" is irrelevant to the scope of the statute's remedial goal of providing restitution to plaintiffs injured by statutory violations. Indeed, the EEOC argues that liquidated damages under the ADEA "should be deemed to serve the compensatory purpose this Court recognized in the FLSA provisions from which they were taken." EEOC Br. at 37. It may similarly be assumed that Congress was aware that the FLSA enforcement scheme was designed to deter employer violations, EEOC Br. at 46, when it adopted FLSA rather than Title VII remedies, especially where legislative history only addresses age-based employment practices by *employers*.[16] In this con-

---

injunctive relief and, "in flagrant cases [e.g., *Stoner*] . . . [a] commission suit for damages." Brief of EEOC at 18, *Northwest Airlines*, 451 U.S. 77. *See* ALPA Resp. Br. at 29-29 & n.37.

[15] Contrary to plaintiffs' argument, Pl. Br. at 24-25, the express backpay remedy provided in § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), cannot serve as a basis for judicial implication of a similar ADEA remedy. *See Lorillard* v. *Pons*, 434 U.S. at 584.

[16] As the EEOC acknowledges, the primary purpose of the ADEA was to rectify discrimination "understood to result not from malice or intolerance, but from unfounded assumptions and ignorance regarding the abilities of older workers." EEOC Br. at 35. The evidence before Congress overwhelmingly addresses this problem in terms of *employer*, not labor organization, discrimination. *See*

text, the EEOC's additional argument, EEOC Br. at 46, that "the employer gains no economic benefit from its own or the union's discrimination against older workers" is simply astonishing. *See EEOC* v. *Wyoming*, —— U.S. ——, 103 S.Ct. 1054, 1070 (1983) (Burger, C.J., dissenting) (taking judicial notice of higher costs of employing older workers).[17]

4. While the EEOC strains to draw inferences from unrelated portions of the legislative history of the 1967 Act, EEOC Br. at 45-46, neither the Senate Report's characterization of § 10 of the Portal-to-Portal Act,[18]

ALPA Resp. Br. at 40-41 n.53. An AFL-CIO representative testified that unions had not engaged in age discrimination, *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 95, 97-98 (1967) (hereinafter "*Senate Hearings*"); neither the EEOC nor plaintiffs have pointed to any evidence of union age discrimination before Congress in 1967. Where Congress considered union conduct to be a substantial problem, as it plainly had a basis to do in Title VII, *see* ALPA Resp. Br. at 40 n.53, it expressly provided monetary remedies against unions, *see, e.g.*, 42 U.S.C. § 2000e-5(g).

[17] Congress adopted § 6(a)(3) of the ADEA in haec verba from § 6(d)(1) of the Equal Pay Act, based on AFL-CIO recommendations and testimony concerning underpayment of older workers. *Age Discrimination in Employment: Hearings on H.R. 9011, H.R. 9709, and H.R. 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess. 412, 418 (1967) (Statement of Kenneth Meiklejohn, Legislative Rep., AFL-CIO) (hereinafter "*House Hearings*"); *Senate Hearings* at 101 (Statement of Andrew J. Biemiller, Legislative Director, AFL-CIO). *See, e.g., EEOC* v. *Westinghouse Electric Co.*, 725 F.2d 211 (3d Cir. 1983) (denying older workers benefits provided to younger employees); *Geller* v. *Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) (refusing to hire more expensive older workers).

[18] Section 10 of the Portal-to-Portal Act provides that "no employer shall be subject to any liability or punishment" if it complies in good faith with certain administrative regulations, and that this "defense, if established shall be a bar to the action or proceeding" in which liability is sought. 29 U.S.C. § 259(a).

nor statements made by AFL-CIO representatives[26] support the suggestion that Congress intended to provide monetary remedies against unions. The Senate Committee Report statement that § 10 is available to an "employer, employment agency or labor organization" as "a valid defense against a suit under this act," S. Rep. No. 723, 90th Cong., 1st Sess. 10 (1967), simply extends the reach of a § 10 defense to the full extent of the conduct prohibited by § 4 of the ADEA, without any distinction between suits for equitable relief and suits for money damages. Moreover, even assuming that § 10 was intended "to give protection from money judgments" and "does not affect prospective injunctive actions,"[27] EEOC Br. at 46, Congress may have intended § 10, as incorporated in the ADEA, to insulate defendants from the economic burdens of non-monetary, equitable remedies for past discrimination, *e.g.*, constructive seniority, restoration of pension rights, or affirmative action in promotions or training.[28] While Congress denied an AFL-CIO request to remove unions entirely from the coverage of the Act, there is no logical basis to infer an intent to vary the incorporated provisions of the FLSA, which

[26] The AFL-CIO proposed an amendment to have the ADEA enforced under the remedies and procedures provided in the FLSA. *Senate Hearings* at 101; this proposal is substantially similar to § 7(b) as adopted by Congress. The EEOC's argument, EEOC Br. at 45, that FLSA enforcement procedures were not "of critical importance" to the AFL-CIO, is based on a colloquy between Rep. Hawkins and AFL-CIO representative Mieklejohn, in which the AFL-CIO took the position that whether the Wage and Hour Division or a separate bureau in the Department of Labor should enforce the ADEA is not "of critical importance." *House Hearings*, at 429-31.

[27] The Sixth Circuit Court of Appeals has squarely held that a § 10 defense, if established, precludes both equitable as well as legal liability based on this statutory language. *Marshall* v. *Baptist Hospital, Inc.*, 668 F.2d 234, 239-39 (6th Cir. 1981).

[28] *See, e.g., General Building Contractors Association, Inc.* v. *Pennsylvania*, 458 U.S. 375, 102 S.Ct. 3141, 3154-55 (1982).

prohibit certain union conduct, 29 U.S.C. § 215(a)(2), (3).[29]

5. The ultimate absurdity of the arguments made by the EEOC and plaintiffs is revealed in their requests to have this Court award liquidated damages against ALPA. As a procedural matter, it is inappropriate to request that this Court decide the factual question whether ALPA's asserted violations were willful.[30] As a substantive matter, the arguments for liquidated damages are even more strained than the requests for "amounts owing."

[29] In testimony to the Senate Committee in March, 1967, AFL-CIO representative Biemiller requested deletion of the Act's application to unions based on the absence of union age discrimination, and a concern that the Act's record keeping requirements would be onerous for local unions. *Senate Hearings* at 98. That request was not made to the House Committee during representative Mieklejohn's testimony on August 17, 1967. *House Hearings* at 412, 418.

[30] The Second Circuit *did not* find conduct by ALPA to be a "willful" violation of the ADEA, since, in its initial decision, it held that only equitable back pay, rather than legal and liquidated damages, could be recovered against unions. A-34. In *Pullman-Standard* v. *Swint*, 456 U.S. 273, 102 S.Ct. 1781, 1790 (1982), this Court held that the issue of "discriminatory intent" under § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) "is a finding of fact to be made by the trial court." Where "a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings. . . ." 102 S.Ct. at 1791 Similarly, "willfulness" is a finding of fact to be made by the district court in the event that this Court finds that the ADEA provides for liquidated damages against unions.

Moreover, the specific "evidence" of willfulness presented by plaintiffs is specious. *See* Pl. Br. at 42. ALPA's declaratory judgment action was not considered as a basis for liability, A-33 n.19; what ALPA has or has not done in representing pilots employed by airlines other than TWA is irrelevant, and utterly without foundation in this record; ALPA's alleged admission "that [*ALPA* v. *TWA*] is motivated by economic, not just safety concerns" consisted only of bringing to the attention of the Court below the economic impact of TWA's 1978 change in policy. *See* A-17, n.11.

The EEOC acknowledges that liquidated damages against unions are not available in § 16(b) employee actions, but offers no justification for broader remedies in § 16(c) government enforcement actions. The "legal or equitable relief" language of § 7(c) does not authorize the extraordinary remedy of double damages, *see* ALPA Br. at 36-37; § 17 of the FLSA has uniformly been construed not to authorize liquidate damages. *Id.* at 29-30. Even if the policies of Title VII could serve as a basis for union monetary liability in an ADEA action, Title VII makes no provision whatsoever for liquidated damages. Neither the EEOC nor plaintiffs cite any authority for an award of liquidated damages against labor organizations under the ADEA, nor provide any other basis for judicial imposition of this extraordinary relief.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed insofar as it holds that ALPA and TWA have violated the ADEA, or in the alternative, that portion of the judgment which holds that ALPA is not liable for damages should not be disturbed.

Respectfully submitted,

MICHAEL E. ABRAM
330 West 42nd Street
New York, New York 10036
(212) 563-4100
Counsel of Record for Air Line Pilots Association, International

JAY P. LEVY-WARREN
ANN E. O'SHEA
COHEN, WEISS and SIMON
Of Counsel